Supreme Court, U.S.
FILED
06-658 NOV 8 - 2006
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

MCCARRAN INTERNATIONAL AIRPORT AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioners,

v.

STEVE SISOLAK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

DAVID J. J. ROGER
DISTRICT ATTORNEY
E. LEE THOMSON
DEPUTY DISTRICT ATTORNEY
500 South Grand Central Parkway
Fifth Floor
Las Vegas, Nevada 89109
(702) 455-4761

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PETER R. STEENLAND
PETER C. PFAFFENROTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record
[Additional Counsel on Inside Cover]

November 8, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

In light of federal law, which confers on the federal government "exclusive sovereignty" in the airspace of the United States, grants all citizens a public right of transit through "the navigable airspace," and defines the "navigable airspace" to include any airspace less than 500 feet above ground level that is needed to ensure safe takeoffs and landings of aircraft, the questions presented are:

1. Whether federal law precludes recognition under state law of private ownership of federally defined "navigable airspace" that is less than 500 feet above a landowner's property and that the landowner never used before it became part of the navigable airspace.

2. Whether zoning ordinances that merely restrict the use of property near a major airport, by limiting the height of structures in the navigable airspace, effect a *per se* regulatory taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), particularly where (a) the ordinances authorize variances for structures that the FAA concludes do not pose hazards to aviation, and (b) half of respondent's property was subject to a pre-existing perpetual avigation easement for the passage of aircraft that has never been found to violate the nexus and proportionality requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Federal Regulation Of Navigable Airspace	4
B. Role Of State And Local Authorities In Protecting Navigable Airspace.	5
C. McCarran Airport And Respondent's Property	6
D. Proceedings And Rulings Below.	8
REASONS FOR GRANTING THE PETITION	11
I. RECOGNITION UNDER STATE LAW OF PRIVATE OWNERSHIP OF THE NAVIGABLE AIRSPACE NEEDED FOR SAFE TAKEOFFS AND LANDINGS RAISES A VITALLY IMPORTANT QUESTION OF FEDERAL LAW	12
A. Federal Law Precludes Recognition Under State Law Of Private Ownership Of Federally Defined Navigable Airspace	12

TABLE OF CONTENTS—continued

Page

B Recognition Under State Law Of Private Ownership Of Navigable Airspace Has Profound And Detrimental Implications For The National Air Transportation System..... 14

C. Recognition Under State Law Of Private Ownership Of The Navigable Airspace Conflicts With The Decisions Of This And Other Courts 18

II. THE NEVADA SUPREME COURT'S FINDING OF A *PER SE* REGULATORY TAKING IS ERRON-EOUS AND CONFLICTS WITH THE DECISIONS OF THIS AND OTHER COURTS... 22

A. The Nevada Court's Conclusion That Use Restrictions Constitute A *Per Se* Taking Conflicts With The Decisions Of This Court..... 22

B. The Nevada Supreme Court's Refusal To Give Effect To A Valid Avigation Easement Conflicts With This Court's Precedents And With A Decision Of The Ninth Circuit. 26

III. THE DECISION IN THIS CASE DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND 29

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES

Air Line Pilots Ass'n Int'l v. *Department of Transp., FAA*, 446 F.2d 236 (5th Cir. 1971)..... 26
Air Pegasus of D.C., Inc. v. *United States*, 424 F.3d 1206 (Fed. Cir. 2005) 21
Aircraft Owners & Pilots Ass'n v. FAA, 600 F.2d 965 (D.C. Cir. 1979) 13
American Airlines, Inc. v. *Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968) 17
Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 29
Bush v. *Gore*, 531 U.S. 98 (2000) 29
Cheyenne Airport Bd. v. *Rogers*, 707 P.2d 717 (Wyo. 1985) 20
City of Austin v. *Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002) 21
Coleman v. *Thompson*, 501 U.S. 722 (1991) 29
County of Clark v. *Hsu*, No. 38853 (Nev. Sept. 30, 2004) 9
Daniel v. *County of Santa Barbara*, 288 F.3d 375 (9th Cir. 2002) 20, 29
Dolan v. *City of Tigard*, 512 U.S. 374 (1994)..... 27
Griggs v. *Allegheny County*, 369 U.S. 84 (1962).. 10, 20
Harrell's Candy Kitchen, Inc. v. *Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959) 20
La Salle Nat'l Bank v. *Cook County*, 340 N.E.2d 79 (Ill. App. Ct. 1975)..... 21
Lingle v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)..... 22
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)..... 2, 22, 23, 24
NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958)..... 29

TABLE OF AUTHORITIES—continued

	Page
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987)	9, 27
Palm Beach Isles Assocs. v. *United States*, 208 F.3d 1374 (Fed. Cir.), *aff'd on reh'g*, 231 F.3d 1345 (Fed. Cir. 2000), *overruled on other grounds*, *Bass Enters. Prod. Co.* v. *United States*, 381 F.3d 1360 (Fed. Cir. 2004)	21
Penn Cent. Transp. Co. v. *City of New York*, 438 U.S. 104 (1978)	2, 11, 25
Pumpelly v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871)	23
United States v. *Causby*, 328 U.S. 256 (1946)	10, 19, 20
Village of Willoughby Hills v. *Corrigan*, 278 N.E.2d 658 (Ohio 1972)	21
Ward v. *Board of County Comm'rs*, 253 U.S. 17 (1920)	29
West Va. Dep't of Transp. v. *Dodson Mobile Homes Sales & Servs., Inc.*, 624 S.E.2d 468 (W. Va. 2005)	30
Wolfson v. *City of St. Paul*, 558 N.W.2d 781 (Minn. Ct. App. 1997)	30

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. amend. V	1
amend. XIV	1
28 U.S.C. § 1346(a)(2)	5, 30
§ 1491	5, 30
42 U.S.C. § 4654(c)	5, 30
§ 4655(a)(2)	5
49 U.S.C. § 40101(a)	13, 18
§ 40102(a)(32)	1, 4, 13
§ 40103	1, 4, 13
§ 44718	4, 13

TABLE OF AUTHORITIES—continued

	Page
49 U.S.C. § 47107(a)	5, 15, 25
Nev. Rev. Stat. § 497.040	6
14 C.F.R. pt. 77	13
14 C.F.R. § 77.1	4
§ 7.11	4
§ 77.3(a)	5, 25
§ 77.23	4
§ 77.25	4
§ 77.35	5
§ 77.43	5
§ 91.119	4, 13

OTHER AUTHORITIES

Ivanpah Airport Plans Need To Get Off The Runway, In Business Las Vegas, Oct. 20-Oct. 26, 2006 16

Airports Council Int'l, Traffic Statistics, *at* http://www.aci-na.org/asp/traffic.asp?art=215 (last visited Nov. 8, 2006) 6

Clark County Dep't of Aviation, *Comprehensive Annual Financial Report for the Year Ended June 30, 2005* (2005) 6

Tony Cook, *High price for low buildings*, Las Vegas Sun, July 25, 2006 16

FAA, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* (Dec. 14, 1987) 6

FAA, Grant Histories (June 12, 2006), *at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/ 5

TABLE OF AUTHORITIES—continued

Page

FAA, *Land Use Compatibility and Airports: A Guide for Ef ·ve Land Use Planning* (2005), *available at* w.faa.gov/about/office_org/headquarters_offices/aep/planning_toolkit/media/III.B.pdf 1, 7, 18

McCarran Int'l Airport, Current Projects, *at* http://www.mccarran.com/04_05_CurProjects.asp (last visited Nov. 8, 2006) 16

Richard N. Velotta, *Lawsuits could prompt cuts at airport*, Las Vegas Sun, May 28, 2003 16

2 Kenneth H. Young, *Anderson's American Law of Zoning* (4th ed. 1996) 5, 6

PETITION FOR WRIT OF CERTIORARI

Petitioners McCarran International Airport and Clark County respectfully seek a writ of certiorari to the Supreme Court of Nevada.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 137 P.3d 1110 (Nev. 2006) (Pet. App. 1a-52a). The judgment of the Eighth Judicial District Court of the State of Nevada is unreported (Pet. App. 53a-56a).

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 13, 2006. On October 4, 2006, Justice Kennedy granted petitioners' timely application and extended the time for filing the petition to November 9, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Section 40103(a)(2) of Title 49 of the United States Code provides in part: "[a] citizen of the United States has a public right of transit through the navigable airspace" of the United States, and section 40102(a)(32) provides that "navigable airspace" "include[es] airspace needed to ensure safety in takeoff and landing of aircraft." These and other relevant laws are reproduced in full in Pet. App. 57a-107a.

STATEMENT OF THE CASE

The extraordinary decision of the Nevada Supreme Court in this case imperils the scheme of cooperative federalism that serves as the central cornerstone of the national aviation system. Decades ago, Congress placed all of the navigable airspace of the United States within the public domain, granted all citizens a right of transit through that airspace, and authorized the Federal Aviation Administration (FAA) to issue regulations that include airspace less than 500 feet above ground level within the navigable airspace when necessary to ensure safe takeoffs and landings. The FAA has, in turn, relied on local governments and local zoning laws to prevent hazards in this navigable airspace.

In this case, the Nevada Supreme Court held that, under state law, the owner of land near the nation's fifth busiest airport owns all of the airspace up to 500 feet above his undeveloped lots of desert scrub, even though much of this airspace is indisputably needed for safe takeoffs and landings and is thus part of the "navigable airspace" through which the public has a right of transit. This holding incorrectly resolved a critically important question that this Court has never addressed—*i.e.*, whether federal law bars recognition of state law-based ownership of navigable airspace that the owner of the underlying land has never previously used.

The Nevada court then continued its assault on the federal/state regulatory scheme by ruling that ordinances designed to prevent aviation hazards effect a "permanent physical occupation" of respondent's "privately-owned" portion of the navigable airspace. The court concluded that the ordinances were not subject to a regulatory takings analysis under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), but instead gave rise to a *per se* taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Nevada court reached this conclusion despite the facts that (1) the ordinances simply

regulate the use of land by setting height restrictions that, if exceeded, trigger an analysis by the FAA to determine whether a proposed structure would pose a hazard, (2) the ordinances permit variances when the FAA finds that a proposed structure poses no hazard to aviation, and (3) the County had previously approved two development proposals for the lots respondent owned. In a final *coup de grace*, the court held that the County's avigation easements over portions of respondent's property provided no defense to this *per se* taking claim because it viewed easements granted in exchange for development permits as uncompensated takings, without regard to whether they satisfy the nexus and proportionality tests this Court has established for assessing such exactions.

The Nevada court's erroneous decision conflicts with federal law governing the navigable airspace as well as the takings decisions of this and numerous other courts. If left undisturbed, moreover, this mistaken decision will significantly harm the national aviation system. A half dozen similar lawsuits are already pending, and petitioners conservatively estimate that, under the Nevada court's reasoning, they face potential *per se* takings liabilities in the *billions* of dollars. Any response they adopt to avoid or minimize this massive liability will have untoward ripple effects throughout the complex and interdependent air traffic system, increasing air travel costs to and from Las Vegas and adversely affecting air traffic not only at McCarran, but at other airports around the country. Moreover, the Nevada ruling could nullify benefits to air transportation that the federal government has funded at McCarran through improvement projects worth hundreds of millions of dollars. These grants were made in reliance upon Clark County's assurance that it would enact reasonable zoning laws to protect the nation's interest in safe air travel. Not only may the FAA be reluctant to continue its important airport improvement program where its investment is undercut by the

imposition of massive liability for compliance with the grant assurance, but such massive and unfair liabilities will chill cooperation by other local governments that cannot afford the costs of litigation or the risk that other courts will adopt Nevada's approach. Without such cooperation among FAA, airport operators, and local zoning authorities, the future of safe, efficient and unobstructed approach routes to the nation's airports is endangered. The petition should be granted, and the decision below reversed.

A. Federal Regulation Of Navigable Airspace.

Federal law has long established that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1) and historical notes. Further, Americans have a "public right of transit through the navigable airspace." *Id.* § 40103(a)(2). Navigable airspace is defined as "airspace above the minimum altitudes of flight prescribed by regulations . . . , including airspace needed to ensure safety in the taking off and landing of aircraft." *Id.* § 40102(a)(32) (previously codified as § 40102(a)(30)).

Congress has authorized the FAA to regulate the use and scope of navigable airspace. 49 U.S.C. § 40103(b). Pursuant to that delegation, the FAA has established that navigable airspace in uncongested areas begins at an altitude of 500 feet above ground level. 14 C.F.R. § 91.119. However, as mandated by federal statute, navigable airspace begins at lower levels "when necessary for takeoff or landing." *Id.*

Before starting any construction near an airport, a project sponsor must give the FAA notice, whereupon the agency determines whether the construction will pose a hazard to navigable airspace. 49 U.S.C. § 44718; 14 C.F.R. §§ 77.1, 77.11. An object is deemed an obstruction if it exceeds certain absolute height thresholds, or if it would encroach on a defined set of imaginary surfaces that emanate from an airport and its runways. 14 C.F.R. §§ 77.23, 77.25. The FAA may conduct an aeronautical study, including nonadversarial

factfinding hearings, to determine if the penetrating structure is a hazard to aviation. *Id.* §§ 77.35, 77.43. The FAA can and often does find that proposed structures are not hazards.

Furthermore, recipients of federal aviation-related grants are required by statute to enter into binding grant assurances in which they commit to ensure that airspace is cleared of present and future hazards. 49 U.S.C. § 47107(a)(9); 14 C.F.R. § 77.3(a). Airport grant recipients must also commit to adopt "zoning laws . . . to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." 49 U.S.C. § 47107(a)(10). They must also certify that they will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Uniform Act"), which provides for attorney's fees in successful takings claims under the Tucker Act, 28 U.S.C. § 1491, or the Little Tucker Act, 28 U.S.C. § 1346(a)(2). See 42 U.S.C. §§ 4654(c), 4655(a)(2).

In the past 10 years, the FAA issued over $155 million in grants for new runways and related improvements at McCarran in reliance upon such assurances. Virtually every public commercial airport in the country receives such grants and is bound by such assurances.[1] Thus, although the federal government has sovereignty over all navigable airspace, including space below 500 feet where necessary for takeoffs and landings, federal regulation of such airspace relies in substantial part on the efforts of state and local authorities to protect aircraft and persons and property on the ground.

B. Role Of State And Local Authorities In Protecting Navigable Airspace.

Since 1928, local jurisdictions have enacted ordinances and zoning regulations to restrict the height of structures in order to promote air safety. 2 Kenneth H. Young, *Anderson's*

---

[1] *See* FAA, Grant Histories (June 12, 2006), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/.

American Law of Zoning § 12.38 (4th ed. 1996). More than half of the States, including Nevada, have authorized their political subdivisions to issue regulations in order to protect airspace near airports. *Id.*; see Nev. Rev. Stat. § 497.040.

To facilitate enactment of suitable local zoning laws and compliance with the grant assurance that reasonable steps be taken to obviate obstacles to navigable airspace, FAA issued *A Model Zoning Ordinance to Limit Height of Objects Around Airports.* FAA, Advisory Circular 150/5190-4A (Dec. 14, 1987). In establishing height restrictions near an airport, the model ordinance employs imaginary surfaces akin to those set forth in the FAA regulation defining navigable airspace hazards, 14 C.F.R. § 77.25, prohibits construction of structures that would constitute a hazard, and provides that variances should only be granted when accompanied by an FAA determination that the construction would not impede or imperil "the operation of air navigation facilities and the safe, efficient use of navigable airspace." FAA Advisory Circular 150/5190-4A, app. 1, §§ IV, VII.4. Numerous local governments, including Clark County, have adopted zoning ordinances that substantially mirror the FAA Model Ordinance. See, *e.g.*, Clark County Ordinance 1221 (Pet. App. 78a-94a).

C. McCarran Airport And Respondent's Property.

When it was first built, the airport was far from substantial development. It remained relatively isolated for most of the next six decades, and was able to add additional runways as recently as 1997. Over the past decade, however, new development has encroached upon McCarran. The airport occupies nearly 2800 acres, and today borders the Las Vegas "Strip." Clark County Dep't of Aviation, *Comprehensive Annual Financial Report for the Year Ended June 30, 2005*, at 3 (2005). McCarran is the nation's fifth largest in terms of total passengers, handling 44 million travelers in 2005. Airports Council Int'l, Traffic Statistics, *at* http://www.aci-na.org/asp/traffic.asp?art=215 (last visited Nov. 8, 2006).

Respondent owns three parcels of land comprising ten vacant acres. The property lies about one mile directly south of the end of one of McCarran's two north-south runways, and thus has been in the path of arriving and departing aircraft since that runway was built in 1947. Pet. App. 2a & n.3; AA vol. 15, at 3261-62, 3306, 3317 ("AA" refers to the appellants' appendix filed below with the Nevada Supreme Court). Respondent purchased the first parcel in 1983 and the other two in 1986. Pet. App. 2a n.3. The year before he bought the latter parcels, his predecessor-in-interest, R&D Odyssey Racetrack, conveyed to Clark County a perpetual avigation easement over these parcels, which comprise half the total property. AA vol. 1, at 117-18. The easement expressly authorizes aircraft overflights. Pet. App. 5a.

Several zoning ordinances govern the height of structures on the property. When respondent purchased the lots, Ordinance 728 permitted development up to 150 feet above the airport elevation, or 80 to 90 feet above the lots, which are at a higher elevation than McCarran. Pet. App. 3a. This ordinance permitted (and the County routinely granted) variances for taller structures if the FAA issued a "no hazard" determination. *Id.* In 1990, the County adopted Ordinance 1221 to protect the approach zone for the anticipated expansion of McCarran's north-south runways. *Id.* at 78a-94a. This ordinance permitted structures on the property up to 41 to 51 feet high; if developers wanted to build higher, they could seek a "no hazard" determination from FAA and a variance from the County. *Id.* at 4a. In 1994, the County enacted Ordinance 1599, which limited structures in the Aircraft Departure Critical Area. *Id.* at 95a-107a. Respondent's property was thereby presumptively limited to structures with a maximum height of three to ten feet above ground level. *Id.* at 4a-5a. Ordinance 1599 also provides for higher structures through a variance procedure if the FAA makes a "no hazard" finding. *Id.*

Although the property remains undeveloped, the County has previously authorized two projects for the site. In 1985, it approved a go cart facility which was to include 15-foot light poles and a 2800 square foot building. AA vol. 2, at 422-25; *id.*, vol. 3, at 607. In 2001, the County approved a four-story, 600-room hotel/casino resort. Pet. App. 5a-6a. The plan, submitted by a potential purchaser of the land, included a 33,050 square foot casino, retail areas, restaurants, bars, lounges, an indoor pool, parking structures, and maintenance areas. AA vol. 2, at 427. The developer requested approval of a 70-foot structure, "but not less than 66 feet on the ground of hardship and detrimental to the highest and best use of subject property." *Id.*, vol. 2, at 431. The FAA determined that a 66-foot structure would pose no hazard to air navigation, Pet. App. 5a-6a, but expressed no opinion about whether a taller building would pose a hazard. See AA vol. 2, at 433-34. The County granted a variance with its final approval up to 66 feet, but the variance and the approval automatically lapsed when construction did not begin within a year. Pet. App. 5a-6a. Respondent has never been denied a zoning variance for any of the parcels at issue.

D. Proceedings And Rulings Below.

Shortly after the approval of the hotel/casino resort for the property, respondent sued McCarran and the County in state court, advancing two types of claims. First, he argued that, under the United States and Nevada constitutions, the County had inversely condemned his property by virtue of the zoning laws and the passage of aircraft in the airspace above his property. Second, he argued that the noise, dust, fumes, fuel, and vibrations from overflights also devalued his property. Pet. App. 6a. These latter claims were dismissed with prejudice by stipulation. *Id.* at 9a.

On summary judgment, the district court concluded that the zoning laws effected a *per se* taking of respondent's property. Pet. App. 8a. The court rejected McCarran's arguments that respondent did not own all airspace up to 500 feet above his

land, that the flights were not so frequent or so low as to deprive him of an existing use of his land, that the zoning did not require acquiescence in a physical invasion of his property, and that respondent's claims were unripe because he had never been denied a variance. *Id.* at 8a-9a.

At the trial held to determine the compensation due, the court instructed the jury to base its loss calculation on the area above 66 feet, the height of the development that had recently been granted a variance. Pet. App. 11a. The jury returned a verdict in respondent's favor for $6,500,000. *Id.* The district court entered judgment in that amount, and awarded $107,730.68 in costs, $1,950,000 in attorney's fees under the federal Uniform Act, and $8,000,000 in interest, for a total award of $16,617,730.68. *Id.*.

A divided Nevada Supreme Court affirmed. Less than two years earlier, the court had reversed a similar district court ruling in favor of numerous landowners near McCarran, *County of Clark* v. *Hsu*, No. 38853 (Nev. Sept. 30, 2004), but the majority in the present case held that respondent had suffered a *per se* taking. The majority here concluded that, under state law, respondent owned the first 500 feet of airspace above his land. It based this 500-foot boundary on FAA regulations, which define the minimum safe altitude for flight and place all airspace above that threshold "in the public domain." Pet. App. 13a & n.20. Although it recognized that the regulations define the minimum safe altitude for flight to extend below 500 feet when "necessary for takeoff or landing," *id.* at 13a, the majority did not explain why this part of the regulation did not limit respondent's ownership of unused airspace over his land, which lies in the path of arriving and departing aircraft. The majority also held that petitioner's avigation easement provided no defense to respondent's suit. It deemed an easement obtained as a condition of approval of the go-cart facility to be an uncompensated taking under *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 832 (1987), without considering

whether the easement satisfied *Nollan*'s nexus test. Pet. Ap. 161-17a.

The majority held that Ordinances 1221 and 1599 effect a "*Loretto*-type" *per se* regulatory taking under the federal constitution. Pet. App. 17a-21a. The majority deemed the suit ripe on the theory that overflights below 500 feet constitute a permanent physical occupation of respondent's "privately-owned" airspace, and thus give rise to a categorical right to compensation. *Id.* at 21a. According to the majority, respondent could establish such a *per se* taking even though he had disavowed any claim that overflights interfered with the existing use of his property under *United States* v. *Causby*, 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). Pet. App. 22a-23a. Although these cases establish when overflights effect a physical invasion of underlying land, the majority deemed them irrelevant to any claim of a permanent physical occupation under *Loretto*, because neither *Causby* nor *Griggs* involved ordinances regulating the use of land. *Id.* at 23a.

The majority also purported to rest its ruling on the Nevada Constitution. Other than noting that the state constitution expressly recognizes the right to acquire, possess and protect property and typically requires compensation be paid before a taking, the majority identified no difference in the protection afforded property under the state and federal constitutions. Instead, it held that a *per se* taking occurs under Nevada's constitution when an agency appropriates or permanently invades private property for public use without first paying just compensation. Pet. App. 28a-29a. It then reiterated its conclusion that the ordinances effected a permanent physical occupation of respondent's airspace – a conclusion it derived exclusively from this Court's cases and from interpretations of the federal constitution by other state courts. *Id.* at 23a-27a. It also affirmed the award of attorney's fees under the federal Uniform Act. *Id.* at 33a-36a.

Justice Becker dissented. She noted that the court's holding that the state constitution provides greater protections against takings than the federal constitution "contradicts over a century of precedent." Pet. App. 39a. She observed that, "other than general statements that the County Ordinances violated the Federal and State Constitutions, Sisolak never provided any analysis to support an argument that the Nevada Constitution provides more expansive rights under eminent domain." *Id.* She maintained that the case should have been decided under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). Pet App. 40a. Justice Maupin likewise dissented. In his view, it was not "necessary to deviate from federal takings jurisprudence," and the *Penn Central* analysis should have been applied. *Id.* at 52a.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with federal law and the decisions of this and other courts, and has grave implications for the efficiency and safety of the nation's air transport system. In ruling that an owner of a vacant lot owns navigable airspace less than 500 feet above his land, the Nevada court ignored Congress's decision to grant the public a right of transit through navigable airspace needed to take off and land safely at airports. Federal law forecloses recognition of the state law ownership right for which respondent was compensated in this case. Moreover, the court below misapplied this Court's airport takings decisions, which recognize compensable takings only where overflights fundamentally interfere with a preexisting use *of the land*—a claim respondent expressly waived.

In addition, the finding of a permanent physical invasion of respondent's property badly misconstrues this Court's takings jurisprudence in a manner that will undermine the ability of local governments to use zoning laws to prevent hazards to aviation. This Court's cases make clear that ordinances that merely restrict the use of property are subject to an ad hoc

analysis that takes into account whether respondent had any reasonable, investment-backed expectation that he could commercially exploit navigable airspace next to a major airport. Further, in disregarding a valid avigation easement that should have precluded any claimed taking as to one-half of respondent's property, the decision below conflicts with decisions of this Court and the applicable federal circuit.

By exposing petitioners to massive takings liabilities, the decision below will have significant and deleterious ripple effects that threaten the safety and efficiency of the national air transportation system. The Nevada court's transparent attempt to evade certiorari review by purporting to invent, for the first time, an independent state takings jurisprudence poses no obstacle to review of its erroneous and harmful decision. The Nevada court's decision rests on a fundamental mistake concerning the scope of the *federally-defined* navigable airspace. Moreover, the state law takings theory the Nevada court announced does not justify recovery of attorneys' fees under the federal Uniform Act, and thus cannot provide an independent basis for the judgment in this case. Accordingly, the Court should grant the petition and reverse the decision below in order to protect federal law and the vital national interests implicated by the ruling below.

I. RECOGNITION UNDER STATE LAW OF PRIVATE OWNERSHIP OF THE NAVIGABLE AIRSPACE NEEDED FOR SAFE TAKEOFFS AND LANDINGS RAISES A VITALLY IMPORTANT QUESTION OF FEDERAL LAW.

A. Federal Law Precludes Recognition Under State Law Of Private Ownership Of Federally Defined Navigable Airspace.

The decision below rests on the untenable premise that private citizens can own navigable airspace needed to ensure safe takeoffs and landings even when they made no use of that airspace before it became part of the navigable airspace.

Sixty years ago, this Court recognized Congress's authority to place airspace needed for safe navigation in the public domain. *Causby*, 328 U.S. at 261. Building on the common right of passage on navigable waters, Congress gave the United States "exclusive sovereignty" over the nation's airspace, and granted all citizens a "public right of transit" through the "navigable airspace." 49 U.S.C. § 40103(a). The Federal Aviation Act (the Act) authorizes the FAA to define the "navigable airspace," including any "airspace needed to ensure safety in the takeoff and landing of aircraft." *Id.* § 40102(a)(32). The FAA must exercise this and its other authorities in light of the Act's "highest priority," which is "maintaining safety." *Id.* § 40101(a)(1).

This safety rationale forms the basis for the regulations establishing the minimum safe altitudes for flight, which in turn demarcate the "navigable airspace" through which the public has a right of transit. To effectuate the statutory mandate that the safety of takeoffs or landings be ensured, the FAA created exceptions to the 500-foot threshold when lower altitudes are "necessary for takeoff and landing." 14 C.F.R. § 91.119. Thus, while "navigable airspace" typically begins at 500 feet above the ground, that is explicitly not the case in airport approach zones.

Federal law defines navigable airspace below 500 feet in a flexible and context-specific fashion. The FAA requires notice of proposed construction that could affect "safety in air commerce" or "the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports." 49 U.S.C. § 44718(a). Upon receipt of such notice, the FAA evaluates a proposal and decides whether it will create a hazard to air traffic. See generally 14 C.F.R. pt. 77. Although these determinations do not compel any particular action by local zoning boards, see, *e.g.*, *Aircraft Owners & Pilots Ass'n* v. *FAA*, 600 F.2d 965, 966-67 (D.C. Cir. 1979), they determine whether a structure will invade the "navigable airspace." See 14 C.F.R. § 91.119 and Part 77, Subpart C.

The decision below cannot be reconciled with this federal law. Although the Nevada Supreme Court mentions that, under FAA regulations, the 500-foot threshold does not apply in takeoff and landing zones, Pet. App. 13a & n.20, it ignores the implications of that rule. Instead, the court used the 500-foot threshold to mark the boundary of a state law-based ownership right in all superadjacent airspace, without explaining how such ownership can be reconciled with federal regulations that define the navigable airspace to include airspace below 500 feet when necessary to ensure safe takeoff and landing. The imposition of a 500-foot wall around airports, justified not by any diminution in property value or by any preexisting use of the airspace, but instead justified purely by purported private ownership of airspace, is flatly inconsistent with federal regulations that, pursuant to an express delegation from Congress, define the navigable airspace that is needed to ensure safe air travel and through which the public has a right of transit. Federal law thus precludes recognition under state law of private ownership of airspace the FAA deems necessary for takeoff and landing, even if that airspace falls below 500 feet, where, as here, the landowner made no prior use of the airspace before it became part of the navigable airspace.

B. Recognition Under State Law Of Private Ownership Of Navigable Airspace Has Profound And Detrimental Implications For The National Air Transportation System.

Contrary to the Nevada court's assertion, Pet. App. 30a n.88, recognition of private ownership of the navigable airspace surrounding McCarran has major ramifications. The Las Vegas region has experienced explosive growth—all of it long after the airport was built (and much of it, ironically, fueled by the tourism the airport facilitates). Petitioners conservatively estimate that the cost of purchasing the navigable airspace around McCarran could exceed $10 *billion*. Any response to this staggering potential liability

would have untoward effects on a host of users and beneficiaries of the national air transportation system.

Even assuming that repeal of the ordinances would enable petitioners to avoid future takings liabilities,[2] such a response would allow landowners to build structures approaching the height of the Washington Monument immediately next to the airport. The construction of just one such building in the glide path of either set of McCarran's runways would effectively close the airport to commercial aircraft.[3] Repeal of the ordinances would thus leave McCarran's continued operation at the mercy of private developers. A major airport requiring significant investments for improvements and maintenance simply cannot operate under such uncertainty.

On the other hand, it is not at all clear that petitioners could raise the enormous amount of money necessary to purchase all of the "privately-owned" navigable airspace required for McCarran's current operations. And, even if petitioners could pay for all such airspace, doing so would entail equally unacceptable consequences. In order to cover the estimated $10 billion cost of such airspace, petitioners would have to raise McCarran's landing fees by the equivalent of $43 per passenger.[4] Such a huge increase would make McCarran's landings fees 70% higher than the most expensive landing

---

[2] Because it affirmed a judgment measuring damages from the effective date of the Ordinances, it is not clear whether the Nevada court would permit post-repeal suits based on claims that landowners suffered *per se* takings from the Ordinances' effective date until their date of repeal.

[3] If planes cannot descend below 500 feet until they are over airport grounds, the FAA-prescribed glide angle would force them to land so far down McCarran's runways that commercial aircraft could not stop safely. Due to cross-winds, moreover, McCarran must have both sets of runways available in order to support regularly scheduled commercial service.

[4] Federal grant assurances require airports to be as "self-sustaining as possible," which compels airports to look to airport resources to make up budget shortfalls. 49 U.S.C. § 47107(a)(13)(A). As a result, virtually all airport costs are borne by airport users in one form or another.

fees in the nation. This, in turn, would have a devastating impact on the airport and the region it serves.

McCarran is the nation's largest origination and destination airport – *i.e.*, an airport that serves not as a hub, but as the ultimate destination for travelers. Because most travelers to McCarran are vacationers, service to the airport is very price-sensitive. Thus, carriers, particularly those that specialize in low-fare travel, cannot readily pass increased costs on to their customers. In fact, Southwest Airlines has already threatened to curtail service if McCarran increases fees as a result of any judgments it incurs in takings lawsuits. Richard N. Velotta, *Lawsuits could prompt cuts at airport*, Las Vegas Sun, May 28, 2003, at C1. Because "'two customers on each flight represent our entire profit,'" Southwest expects its McCarran flights would operate at a loss if landing fees merely doubled, and that it would have to curtail service. *Id.* Southwest is a leading "low-cost" carrier at McCarran, and a reduction in its substantial service to Las Vegas would reduce price competition, lead to increased fares, and ultimately reduce the number of travelers to a city where nearly half of all visitors arrive by plane. McCarran Int'l Airport, Current Projects, *at* http://www.mccarran.com/04_05_CurProjects.asp (last visited Nov. 8, 2006); see Tony Cook, *High price for low buildings*, Las Vegas Sun, July 25, 2006, at A1. A decrease in the number of passenger flights would force petitioners to raise landing fees even higher, which would lead to a vicious cost-spiral as fewer flights are forced to pay for the navigable airspace around the airport.

Even if increased fees did not cause a decline in passengers, the huge expense of purchasing that airspace would prevent petitioners from building Ivanpah, a new supplemental airport 45 miles from Las Vegas that is projected to open in 2017. McCarran itself is expected to reach full capacity as early as 2012. Without Ivanpah, petitioners cannot meet future passenger demand, to the detriment of the Las Vegas region. See *Ivanpah Airport Plans Need To Get Off The Runway*, In

Business Las Vegas, Oct. 20 - Oct. 26, 2006 (delays in the construction of the new airport "could prove disastrous with a new boom happening"). And, because airports operating at peak capacity inevitably spawn delays, petitioners' inability to build Ivanpah will inconvenience travelers to and from Las Vegas in future years, and add strains on the highly complex and interdependent air traffic system. See FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1 (2005), *available at* www.faa.gov/about/office_org/headquarters_offices/aep/planning_toolkit/media/III.B.pdf. ("what happens at an individual airport may affect other airports within the system"); *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226, 233 (E.D.N.Y. 1967) ("Every . . . take-off and landing is a moving part in a vast complex of regional aircraft traffic control"), *aff'd*, 398 F.2d 369 (2d Cir. 1968).

To mitigate these problems, petitioners may be forced to purchase less than all of the navigable airspace needed to maintain current operations. For example, petitioners might choose not to purchase certain navigable airspace necessary to ensure the safe departure of aircraft capable of flying to international destinations, or even the east coast. This could allow petitioners to avoid a meaningful portion of the overall takings liability that the decision in this case will otherwise impose. But the takings "savings" would come at significant operational costs, both at McCarran and elsewhere.

Without this navigable airspace, many planes currently used to provide service to Las Vegas would be unable to take off fully loaded with all of the fuel necessary to make certain long-distance flights, especially in the hotter summer months. If airlines cannot operate such long-distance flights safely or economically out of McCarran, more long-distance travelers would have to switch planes elsewhere in order to reach the city. This would have ripple effects in hubs where Las Vegas-bound or -returning passengers would have to change planes, and where more flights would be necessary to meet

passenger demand to and from Las Vegas. It would also exacerbate congestion at McCarran, as more flights would be needed to carry the number of passengers that currently arrive and depart via fully-loaded aircraft. This, in turn, has implications for the federal government's management and operation of the complex Air Traffic Control system and for airlines and customers at affected hubs. Finally, it would undermine the significant federal investment ($155 million over the past 10 years) made to expand McCarran's capacity in terms of numbers and size of aircraft.

In short, the massive takings liability the Nevada courts have imposed on a major national airport will inescapably and severely undermine the fundamental goals of the Federal Aviation Act, which seeks to maintain the highest degree of safety in air travel, and to promote "the availability of a variety of adequate, economic, efficient, and low-priced services." 49 U.S.C. § 40101(a)(4). To paraphrase John Donne, no airport is an island unto itself. The reality is that "[l]ocal planning for airport growth cannot be accomplished without consideration of national, state and regional needs." FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1. Recognition of private ownership of the navigable airspace outside McCarran will place an enormous strain on one of the largest cogs in this highly complex and interdependent system, and that strain will inescapably burden this vital network as a whole – through sharply increased costs, severely reduced capacity, increased congestion, or (most likely) some combination of these untoward problems. This Court should therefore grant the petition to forestall these deleterious impacts.

C. Recognition Under State Law Of Private Ownership Of The Navigable Airspace Conflicts With The Decisions Of This And Other Courts.

The decision below conflicts with the decisions of this Court and those of other state courts, which have recognized that navigable airspace, including that necessary for takeoff

and landing, is in the public domain, and have found takings only in extreme circumstances wholly missing here.

The Nevada Supreme Court believed that, in *Causby*, 328 U.S. at 263-64, this Court recognized that landowners own all of the useable space above their property. It likewise read *Griggs*, 369 U.S. at 89-90, as establishing that, "although airplanes may fly below 500 feet when necessary for takeoff and landing, this right does not divest the property owner of his protected property right to his usable airspace." Pet. App. 13a-14a. These readings of *Causby* and *Griggs* are fundamentally mistaken. In fact, respondent stipulated to the dismissal of any *Causby/Griggs*-type takings claim, and for good reason: these cases recognize takings only where low and frequent overflights egregiously interfere with pre-existing uses of the land itself.

Causby made clear that takings claims based on overflights should not normally prevail "in the modern world.... Common sense revolts at the idea." 328 U.S. at 261. The Court adopted Congress' view that "[t]he air is a public highway," *id.*, and specifically distinguished the case before it from claims, like this one, involving mere overflights. "To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *Id.*

The Court found a taking on the facts before it, however, because the low and frequent overflights destroyed Causby's chicken farm. "The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it *affect the use of the surface of the land itself.*" *Id.* at 265 (emphasis added). Thus, the Court did not recognize a taking based on an invasion of any airspace below 500 feet, or even the invasion of airspace that a landowner might someday seek to develop. Rather, it held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a

direct and immediate interference with the enjoyment and use of the *land*." *Id.* at 266 (emphasis added).

Griggs reaffirmed this holding. It found a taking where an airport constructed a new runway so close to petitioner's preexisting home that aircraft taking off routinely passed within 30 feet of the home, rendering it essentially uninhabitable. 369 U.S. at 87-89. Thus, like *Causby*, *Griggs* did not recognize an ownership right in all superadjacent airspace below 500 feet, or in all potentially usable superadjacent airspace. Instead, *Griggs*, like *Causby*, found a taking only where overflights destroyed the preexisting use of the land.

Here, by contrast, overflights do not destroy any preexisting use of respondent's property. Indeed, that property was vacant when respondent acquired it 40 years after the airport was built. Moreover, the fact that the County approved two commercial uses of the property demonstrates that overflights do not prevent "enjoyment and use of the land" itself. *Causby*, 328 U.S. at 266. The decision of the Nevada court thus conflicts with *Causby* and *Griggs*. It ignores this Court's recognition that navigable airspace is in the public domain, and this Court's requirement that, in overflight cases, a taking is established only if flights are so low and frequent that they significantly impair the use of the subjacent land itself.

The ruling below also conflicts with the decisions of numerous State courts. In *Cheyenne Airport Board* v. *Rogers*, the Wyoming Supreme Court held that zoning restrictions on the height of objects near an airport were not a taking, even where they compelled the destruction of a tree that had grown beyond approved limits. 707 P.2d 717, 732 (Wyo. 1985). On the contrary, it was the object on the ground that was responsible for the encroachment *on the sovereign airspace*, and the zoning ordinance did not take plaintiff's property by protecting the airspace against incursions by "activities on the surface." *Id.* at 725. Florida and Illinois courts have reached the same conclusion. See *Harrell's Candy Kitchen, Inc.* v.

Sarasota-Manatee Airport Auth., 111 So. 2d 439, 444 (Fla. 1959) (no taking where building height limited to 27.64 feet); *La Salle Nat'l Bank* v. *Cook County*, 340 N.E.2d 79, 89 (Ill. App. Ct. 1975) (rejecting takings challenge to height restrictions near airport). Similarly, the Ohio Supreme Court held that a takings claim does not lie simply because it would be "physically *possible*" to build into navigable airspace; where owners did not previously make use of airspace above their land and it was not reasonably foreseeable that they would do so, they had no compensable property interest in such airspace. *Village of Willoughby Hills* v. *Corrigan*, 278 N.E.2d 658, 664-65 (Ohio 1972). And the Texas Supreme Court rejected a takings claim brought by an owner of a vacant lot, holding that the mere invasion of airspace above property does not constitute a *per se* taking. *City of Austin* v. *Travis County Landfill Co.*, 73 S.W.3d 234, 242 (Tex. 2002). The Texas Supreme Court explained that a landowner "has no right to exclude overflights above its property, because airspace is part of the public domain." *Id.*

The decision of the Nevada Supreme Court also conflicts with decisions of the Federal Circuit, which has likewise recognized that "[p]rivate property interests simply do not, as a general matter, exist in the navigable airspace of the United States," *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206, 1219 (Fed. Cir. 2005), and that navigable servitudes constitute a "'pre-existing limitation upon the landowner's title.'" *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1384 (Fed. Cir.), (quoting *Lucas* v. *South Carolina Coastal Comm'n*, 505 U.S. 1003, 1028-29 (1992)), *aff'd on reh'g*, 231 F.3d 1345 (Fed. Cir. 2000), *overruled on other grounds*, *Bass Enters. Prod. Co.* v. *United States*, 381 F.3d 1360 (Fed. Cir. 2004).

* * * *

The Nevada Supreme Court's conclusion that respondent owns navigable airspace above his land is plainly erroneous, conflicts with the decisions of this Court and the decisions of

other state and federal courts, and will have significant and deleterious effects on the national air transportation system. This Court should grant the petition and reverse that decision.

II. THE NEVADA SUPREME COURT'S FINDING OF A *PER SE* REGULATORY TAKING IS ERRONEOUS AND CONFLICTS WITH THE DECISIONS OF THIS AND OTHER COURTS.

Having improperly recognized private ownership of the navigable airspace, the Nevada Supreme Court compounded its error by ruling that local ordinances that merely restrict the use of property in order to protect such airspace from potential hazards effect a *per se* taking. That ruling plainly conflicts with the decisions of this Court and raises important questions of federal law. Similarly, the Nevada court's conclusion that petitioners' avigation easement provided no defense to such a takings claim is flatly inconsistent with this Court's decisions, and conflicts with a Ninth Circuit decision.

A. The Nevada Court's Conclusion That Use Restrictions Constitute A *Per Se* Taking Conflicts With The Decisions Of This Court.

The conclusion of the Nevada Supreme Court that the ordinances at issue in this case constituted *per se* takings is directly at odds with this Court's precedents, particularly *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Penn Central* itself. This Court has explained that there are only "two categories of regulatory action that generally will be deemed *per se* takings." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The first is where "government requires an owner to suffer a permanent physical invasion of her property." *Id.* (citing *Loretto*). The second is where regulations "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Id.* (alteration in original) (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). "Outside of these two relatively narrow categories (and the special context

of land-use exactions . . .) regulatory takings challenges are governed by the standards set forth in *Penn Central*." *Id.*

The ordinances at issue here are plainly restrictions on the *use* of property subject to *Penn Central*'s ad hoc takings analysis. They limit the height of structures, and thus govern the manner in which property may be used. This is confirmed by the variance procedures, which respondent's predecessor-in-interest and a would-be purchaser used to gain approval for proposed structures on the property above the specified height limits following FAA determinations that these structures would not pose hazards to air safety. Indeed, the Nevada Supreme Court itself recognized that "this case does involve ordinances affecting use of property. Pet. App. 23a.

The court nevertheless concluded that the ordinances effected a *per se* taking within the meaning of *Loretto*. A *Loretto*-type taking, however, requires a *permanent physical occupation* of land compelled by a regulation, not restrictions on land use. Absent such a compelled invasion (or its functional equivalent), ordinances that simply restrict use of property cannot effect a *per se Loretto*-type regulatory taking.

Loretto makes clear that a *per se* regulatory taking based on a physical invasion requires a permanent physical invasion of land or real estate. It traced the origins of this category of *per se* takings to *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall) 166 (1872), and the Court's conclusion that, "'where *real estate* is actually invaded by superinduced water,'" a taking occurs. *Loretto*, 458 U.S. at 427 (emphasis added) (quoting *Pumpelly*, 80 U.S. at 181). *Loretto* explained that later cases characterized *Pumpelly* "as involving 'a physical invasion of the *real estate* of the private owner,'" *id.* at 428 (emphasis added) (quoting *Northern Transp. Co.* v. *Chicago*, 99 U.S. 635, 642 (1879)), and "clearly establish that permanent occupations of *land* . . . are takings." *Id.* at 430 (emphasis added).

Loretto cited *Causby* and *Griggs* as cases that "confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id.* It noted that, in *Causby*, the Court found a taking because low and frequent overflights imposed a loss on the landowner "'as complete as if the United States had entered upon *the surface of the land* and taken exclusive possession of it.'" *Id.* (emphasis added) (quoting *Causby*, 328 U.S. at 261). Such overflights caused an "'intrusion so immediate and direct as to subtract from the owner's full enjoyment of the *property* and . . . limit[ed] his exploitation of *it*.'" *Id.* at 431 (emphasis added) (quoting *Causby*, 328 U.S. at 265, 265-66). Thus, a central element of a *Loretto*-type *per se* taking is a permanent physical invasion of land or an invasion of superadjacent airspace so severe that it is effectively an invasion of the land itself.

The decision below squarely conflicts with *Loretto*. The fact that respondent waived any *Causby/Griggs* claim prevented him from establishing a central element of a *per se* taking under *Loretto*: a physical invasion of land (or its functional equivalent). Thus, even if zoning laws that merely prevent air traffic hazards could be viewed as compelling (within the meaning of *Loretto*) a *Causby/Griggs*-type physical invasion of land, there was no such invasion here.

Loretto also confirms that local regulations that permit third-parties temporarily to invade or occupy property do not constitute *per se* takings. *Loretto* explained that the Court had not found *per se* takings where the federal government claimed a navigable servitude that permitted members of the public to enter a privately-owned marina, or where California compelled a shopping center to permit advocacy speech on its premises. *Id.* at 433-34 (discussing *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) and *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980)). *Loretto* stressed that while a physical invasion "is a government intrusion of an usually

serious character," it is not a *per se* taking if the invasion is temporary, rather than permanent.

The invasions of the airspace above respondent's property are temporary under *Loretto* and its reading of *Kaiser* and *PruneYard*. The fact that the ordinances grant "permanent permission" for such temporary invasions, Pet. App. 26a, is irrelevant. It is the physical occupation itself, not the laws permitting or compelling that occupation, that must be permanent. Indeed, the ordinances are no more permanent than the servitude imposed in *Kaiser*, or the constitutional mandates that compelled access in *PruneYard*.

Finally, in *Penn Central*, this Court flatly rejected the very type of *per se* taking claim that the Nevada court recognized. Under the Landmarks Law at issue in *Penn Central*, the property owner was denied the ability to use "air rights" to construct a building above Grand Central Terminal. In language directly applicable here, the Court explained that a claim that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest ["air rights"] that they heretofore had believed was available for development [wa]s quite simply untenable." *Penn Cent.*, 438 U.S. at 130.

The conflict with this Court's decisions is extremely important. As noted above, the FAA relies on local land use restrictions to prevent air traffic hazards and thereby promote air safety. Indeed, recipients of federal aviation-related grants are obligated to ensure that airspace is clear of all present and future hazards, 49 U.S.C. § 47107(a)(9); 14 C.F.R. § 77.3(a), and the ordinances at issue here closely mirror the FAA Model Ordinance. The Nevada Supreme Court's conclusion that these ordinances effect *per se* takings seriously undermines this pillar of the air safety system.

First, the many untoward consequences of recognizing private ownership of the navigable airspace around McCarran are compounded by the Nevada court's *per se* takings

analysis. Under a *Penn Central* analysis, many of the "owners" of this navigable airspace would have great difficulty establishing that the ordinances caused any taking at all. For example, absent an FAA "no hazard" determination, structures in takeoff and landing zones cannot readily obtain insurance, see *Air Line Pilots Ass'n Int'l* v. *Department of Transp., FAA*, 446 F.2d 236, 241 (5th Cir. 1971)—a fact that would seriously impede any showing of a *reasonable* investment-backed expectation by "owners" that they could commercially exploit this "property." Moreover, under a *Penn Central* analysis, petitioners could, consistent with FAA rulings, use the variance procedure to avoid or mitigate takings liability. By precluding such inquiries, the *per se* takings ruling greatly increases petitioners' financial exposure, which in turn forces petitioners to respond with measures that will inescapably affect and impair the nationwide air traffic system.

Second, a decision to allow the Nevada Supreme Court's decision to stand could lead other state courts to employ the same mistaken *per se* analysis to identical or comparable ordinances around the nation. Given the fundamentally important role local zoning restrictions play in ensuring air safety, the issue of whether such ordinances cause *per se* takings should not be allowed to "percolate" in the state court systems. The decision in this case is clearly erroneous, conflicts with *Loretto*, and (if left undisturbed) will impair and disrupt the national air safety system. The Court should grant review now, to prevent impairments or disruptions from similarly misguided state court decisions.

B. The Nevada Supreme Court's Refusal To Give Effect To A Valid Avigation Easement Conflicts With This Court's Precedents And With A Decision Of The Ninth Circuit.

The Nevada Supreme Court also erred by refusing to give effect to petitioners' perpetual avigation easement, reasoning that "an uncompensated easement as a condition to

development is improper and cannot be used by the County as a defense to the taking of a landowner's airspace without compensation." Pet. App. 16a. Quoting selectively from *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), the Nevada court stated that "'to obtain easements of access across private property the State must proceed through its eminent domain power,' because 'requiring uncompensated conveyance of [an] easement outright would violate the Fourteenth Amendment.'" Pet. App. 16a-17a (alteration in original) (quoting *Nollan*, 483 U.S. at 832, 834). In fact, the Nevada court's disposition of petitioners' easement defense is flatly inconsistent with *Nollan*.

In *Nollan*, this Court did not hold that States must acquire easements through eminent domain. Although it observed that the agency in that case might not be able, as a matter of California law, to acquire easements except through eminent domain, *Nollan*, 483 U.S. at 841-42, this Court held that, as a matter of federal constitutional law, States can require that easements "be conveyed as a condition for issuing a land-use permit." *Id.* at 834. Such an easement must "serve[] the same governmental purpose as the development ban," *id.* at 837, and must be roughly proportional to the impact of the development permitted. See *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). If these conditions are met, the easement is not an "uncompensated" taking at all. The Nevada Supreme Court's conclusion that *Nollan* flatly barred petitioners from obtaining an easement from respondent's predecessor-in-interest, without regard to the nexus and proportionality standards, is a complete perversion of *Nollan*'s rationale.

This erroneous refusal to give effect to petitioners' avigation easement compounds the many untoward effects of its mistaken recognition of private ownership rights in the navigable airspace around McCarran. As the court noted, "similar avigation easements are recorded against property throughout Clark County as a condition of building permits." Pet. App. 16a. By eliminating these easements as defenses to

takings claims by other landowners, the Nevada court significantly increased petitioners' potential liability, which, as noted above, will force petitioners to respond with measures that will affect the nationwide system.

Finally, the Nevada court's disposition of the avigation easement conflicts with the Ninth Circuit's ruling that a landowner cannot bring a takings claim based on a physical occupation where his predecessor-in-interest had granted an easement in order to obtain a development permit. In *Daniel* v. *County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), the Ninth Circuit concluded that, in such circumstances, the successor-in-interest has not been deprived of any property for which compensation is due. If the easement fails the *Nollan/Dolan* nexus and proportionality standards, the resulting taking occurred when the easement was granted. "'A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury.'" *Id.* (quoting *Carson Harbor Village Ltd.* v. *City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994)). In such a situation, the property for which the successor seeks compensation was not part of the property he purchased, because it was appropriated from the prior owner.

Under the Ninth Circuit's reasoning, the avigation easement was a valid defense to respondent's taking claim. Half of his land was subject to the easement when he bought it. Thus, even assuming that his predecessor owned all airspace up to 500 feet above the land, the right to the airspace encompassed by the easement was taken from the predecessor as a condition of the development permit, and was not conveyed to respondent when he purchased the land.

The Nevada court's reasoning in this case cannot be reconciled with the reasoning in *Daniel*. This split of decisional authority between a state supreme court and a federal circuit encompassing that state provides yet another reason to grant the petition.

III. THE DECISION IN THIS CASE DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

Tacitly recognizing the impropriety of its analysis, the majority purported to ground its *per se* taking conclusion in the state constitution. *Id.* This aspect of the court's decision, however, does not shield its analytical errors from review. This part of the decision is not "adequate to support the judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991).

To begin with, the Nevada court's conclusion that respondent owned the navigable airspace above his land does not rest on an independent and adequate state law ground. The court relied on FAA regulations to determine the scope of this ownership right. The court's clear misunderstanding concerning the scope of the "navigable airspace" rests entirely on an error of federal, not state, law, and that error was indispensable to the judgment in this case.

Moreover, even if the court had based ownership of the navigable airspace entirely on state law, this would still raise a federal question. Federal law expressly grants a public right of transit through all navigable airspace. Recognition under state law of private ownership of this airspace, therefore, raises a question of federal supremacy. Thus, even assuming there is any fair or substantial support for the conclusion that a *per se* taking can be found under Nevada's constitution where none can be found under the federal constitution,[5] the

---

[5] In the rare situations where state courts have purported to rely on state law to evade review, this Court has properly looked behind the ruling to determine whether the purported non-federal grounds for decision are "without any fair or substantial support." *Ward* v. *Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920); *see also NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456-57 (1958); *Bouie* v. *City of Columbia*, 378 U.S. 347, 361-62 (1964); *Bush* v. *Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

Nevada court's invocation of the state constitution poses no obstacle to review of the first question presented.

Nor does the majority's *ipse dixit* concerning the state constitution pose a barrier to review of the second question presented. The judgment entered in this case inescapably rests on the court's finding of a *per se* taking under the federal constitution. That judgment includes over $2 million in fees and costs awarded under the federal Uniform Act. That act permits awards of attorneys fees to successful plaintiffs in takings actions brought under two federal statutes, see 42 U.S.C. § 4654(c), both of which permit claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. §§ 1346(a)(2), 1491. Whatever the propriety of applying the Uniform Act to state agencies that effectuate takings,[6] the Act authorizes fee awards only for a takings claim founded upon federal law. Thus, the judgment awarding over $2 million in attorneys fees in this case must rest on the Nevada court's erroneous finding of a *per se* taking under the federal constitution. Accordingly, this aspect of the decision is plainly subject to review by this Court. For the reasons already stated, the decision warrants review and reversal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

---

[6] *See, e.g., West Va. Dep't of Transp.* v. *Dodson Mobile Homes Sales & Servs., Inc.*, 624 S.E.2d 468, 472-73 (W. Va. 2005); *Wolfson* v. *City of St. Paul*, 558 N.W.2d 781, 783 (Minn. Ct. App. 1997).

Respectfully submitted,

DAVID J. J. ROGER
DISTRICT ATTORNEY
E. LEE THOMSON
DEPUTY DISTRICT ATTORNEY
500 South Grand Central Parkway
Fifth Floor
Las Vegas, Nevada 89109
(702) 455-4761

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PETER C. PFAFFENROTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

KIRK B. LENHARD
R. DOUGLAS KURDZIEL
SCOTT M. SCHOENWALD
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89109
(702) 862-3300

LORI POTTER
DANIEL S. REIMER
THOMAS R. DEVINE
ARTHUR P. BERG
KAPLAN KIRSCH &
ROCKWELL LLP
1675 Broadway,
Suite 2300
Denver, Colorado 80202
(303) 825-7000

Counsel for Petitioners

November 8, 2006

* Counsel of Record

APPENDIX

APPENDIX A

SUPREME COURT OF NEVADA

No. 41646

MCCARRAN INTERNATIONAL AIRPORT and CLARK COUNTY, a Political Subdivision of the State of Nevada,
Appellants,

v.

STEVE SISOLAK,
Respondent.

July 13, 2006

Before the Court En Banc.[1]

OPINION

HARDESTY, J.

In this appeal, we determine whether the district court properly concluded that a county height restriction ordinance effected a "per se" taking of the airspace above private land that is located within the departure critical area of an airport approach zone. Appellant Clark County operates McCarran International Airport, the primary commercial airport serving southern Nevada. The County adopted height restriction ordinances limiting the development of respondent Steve Sisolak's airspace. The district court concluded that the height restriction ordinances effectuated a per se taking, and a jury awarded Sisolak compensatory damages of $6.5 million.

[1] The Honorable Deborah A. Agosti, Senior Justice, was appointed by the court to sit in place of the Honorable Robert E. Rose, Chief Justice, who voluntarily recused himself from participation in the decision of this matter. Nev. Const. art. 6, § 19; SCR 10.

Thereafter, the district court awarded Sisolak attorney fees, costs and prejudgment interest. Because the height restriction ordinances authorize airplanes to make a permanent, physical invasion of the landowner's airspace, we conclude that a *Loretto*-type[2] regulatory per se taking occurred, requiring an award of just compensation. Accordingly, we affirm the district court's judgment.

FACTS

The property

Since 1955, the County has restricted the height of buildings on property in the vicinity of its public use airports. The County's height restriction ordinances are designed to avoid air navigation hazards that could endanger the lives and property of airport users and nearby property occupants.

During the 1980s, Sisolak bought three adjacent parcels of land for investment purposes, which were each zoned for the development of a hotel, a casino, or apartments.[3] Located on the southwest corner of South Las Vegas Boulevard and Arby Avenue in Las Vegas, the parcels lie 5,191 feet from the west end of a McCarran International Airport runway.

When Sisolak purchased the property, Clark County Ordinance 728 was in effect. Passed in order to regulate the height of structures and the use of property in the vicinity of all public use airports, the Ordinance aimed to prevent the establishment of obstructions that would pose air navigation hazards. According to Clark County's legislative findings, such obstructions could "reduce the size of the areas available for the landing, takeoff, and maneuvering of aircraft, thus

---

[2] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[3] Sisolak purchased the first five-acre parcel in 1983. In 1986, he purchased an additional five acres, consisting of two smaller parcels.

tending to destroy or impair the utility and capacity of [public use airports] and the public investment therein."[4]

Under Ordinance 728, Sisolak's property was in a generalized area known as the "horizontal zone." The Ordinance restricted the height for development of property located in the horizontal zone to 150 feet above the established airport elevation. Because Sisolak's property was at a higher elevation than the established airport elevation, and due to the varying elevations on the property itself, Ordinance 728 actually imposed restrictions limiting the height of structures on his property to between 80 and 90 feet above ground level (AGL).

If a property owner desired to exceed the height restriction, Ordinance 728 required the owner to provide notice to the Federal Aviation Administration (FAA) and the Clark County Director of Aviation for a determination that the proposed building was situated or marked so as not to constitute an aircraft navigation hazard. Further, the ordinance required the property owner to apply for a variance with the Clark County Planning Commission. The Planning Commission could grant a variance when

> a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code.

In 1990, McCarran Airport began expanding and upgrading the runway at issue for use by commercial jet aircraft, in conformity with the 1979 Clark County master plan. As a result, the county enacted two ordinances that further affected Sisolak's property.

---

[4] Clark County, Nev., Ordinance 728 (Feb. 3, 1981).

First, the County adopted Ordinance 1221, amending Ordinance 728, in response to the changes in the runway's use. Ordinance 1221 placed Sisolak's property in the precision instrument runway approach zone, which subjected the property to a 50:1 slope restriction.[5] On Sisolak's property, this resulted in an actual height restriction between 41 and 51 feet. However, regardless of the height restrictions for a particular zone, nothing in the Ordinance could be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone.

In order to proceed with a project, Ordinance 1221 required that a property owner notify the FAA of any proposed construction that would (1) exceed a height of 200 feet, (2) exceed "[t]he plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway," or (3) be in an instrument approach area when available information would indicate that the height might exceed any FAA obstruction standard. Ordinance 1221 also provided that the Clark County Planning Commissioners held final authority to grant variances from the height restrictions.

Second, the County enacted Ordinance 1599, which adopted "Airspace Zoning Maps," including an Aircraft Departure Critical Area Map for McCarran Airport. According to the map, Sisolak's property was located in the departure critical area and was therefore placed under an 80:1 slope restriction (limiting an owner's use of airspace one foot above ground level for every 80 feet from the runway), resulting in height restrictions of 3 to 10 feet above ground level. Ordinance

---

[5] Ordinance 1221 defined the runway approach zone as an airspace extending to a horizontal distance of fifty thousand feet from the runway, limiting an owner's use of airspace one foot above ground level for every 50 feet away from the runway for the first ten thousand feet and to a 40:1 slope restriction (one foot above ground level for every 40 feet away from the runway) for the remaining forty thousand feet.

1599 provided for a variance procedure similar to that in Ordinance 1221.

In addition to the height restrictions created by the Ordinances, Sisolak's property was burdened by a perpetual avigation easement granted by Sisolak's predecessor in interest in response to a demand by the County in approving a development application.[6] The easement authorized aircraft flights over one half of the property[7] and provided that the County would have

> a perpetual right of flight, for the passage of aircraft in the air space above the surface of said premises, together with the right to cause in said air space such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air, using said air space or landing at, or taking-off from or operating at, or on the premises known as McCarran International Airport.

The County has required these types of avigation easements since at least 1973 as a standard precondition for development approvals for property anywhere within the County.

Development history

Sisolak's property had always been vacant land. In 1991, Sisolak listed the property for sale. In the following years, he received multiple offers, ranging from $4,752,000 to $7,000,000. However, no sales were completed.

In 2000, one of the potential developers submitted proposed building plans to the FAA and the County for approval.

---

[6] An avigation easement is "a signed, acknowledged recognition of the right of overflight from any airport, including the right to make the noise necessary to operate the aircraft operating from such an airport." Clark County, Nev., Code § 30.08.030 (2005).

[7] Only the second five-acre parcel acquired by Sisolak was proposed for development by the predecessor in interest. Therefore, the easement encumbered only half of Sisolak's property.

The developer wanted to build "Forbidden City," a four-story, 600-room resort hotel and casino. The developer requested a variance from the height restrictions to build up to 70 feet.

During the negotiations, a realtor informed Sisolak of the height restrictions on his property. Following up on this information, Sisolak spoke with Bill Keller, a principal planner with the Clark County Department of Aviation. Sisolak testified that Keller explained the height restrictions on the property and told Sisolak about the variance process. Sisolak claimed that Keller told him not to bother asking for a variance to build to more than 75 feet because the County would not approve it. Keller testified that, while he did not have an independent recollection of a conversation with Sisolak, he normally informs a potential developer of the variance procedure. Keller stated that any height estimates he would have given Sisolak would have been in response to hypothetical situations, not specific to Sisolak's property. The FAA granted the variance, in part, and approved building Forbidden City up to a height of 66 feet, concluding that such a building would not constitute an airport obstruction. The Planning Commission also approved the proposal. However, the approval lapsed because the developer failed to commence construction within the required one-year period. Sisolak did not complete the sale, and no other variance applications were submitted.

Pretrial litigation

Shortly after the attempted sale, Sisolak filed a complaint against the County for inverse condemnation. Sisolak complained that the height restrictions constituted a per se taking of his property under the United States and Nevada Constitutions. Further, Sisolak alleged that low and frequent flights over his property from McCarran Airport devalued the property by subjecting it to noise, dust, and fumes and constituted a compensable taking. The County denied Sisolak's allegations.

Sisolak then filed a motion for summary judgment on the liability issue, in which he asserted that, under state and federal law, he had a property interest in the airspace up to 500 feet.[8] He argued that the County, by passing various ordinances, denied him the use of the airspace above the property by appropriating it for public use, which constituted a per se taking. Claiming that the occupancy of his airspace substantially decreased the value of his land, Sisolak demanded just compensation.

In support of his position, Sisolak submitted a video recording taken from the vacant land that showed planes flying over the property. Neither the airport nor Sisolak provided records showing the exact number of planes using the airspace or at what altitude the planes flew over Sisolak's property. Instead, Sisolak relied on estimates to assert that, on average, approximately 100 planes per day used his airspace at altitudes below 500 feet.

Opposing Sisolak's motion, the County filed a countermotion for summary judgment, arguing that Sisolak did not have a vested property interest in the airspace over his land. According to the County, Sisolak had failed to demonstrate a per se taking because he had not shown that the flights over his land were so low and so frequent as to deprive him of the existing use of the property. Further, the County contended, the Ordinances did not require Sisolak to acquiesce to a physical invasion of the property and, in any case, Sisolak's claim was not ripe because he had never been denied a variance.

After a hearing, the district court denied Sisolak's motion, finding that genuine issues of material fact remained re-

---

[8] The airspace above 500 feet constitutes "navigable airspace," defined as "airspace above the minimum altitudes of flight prescribed by regulations . . . including airspace needed to ensure safety in the takeoff and landing of aircraft," and is considered to be in the public domain. 49 U.S.C. § 40102(a)(30) (2000).

garding whether Sisolak was injured by the County's use of the airspace. Although the district court agreed with Sisolak regarding the inverse condemnation law, it could not discern from the evidence whether the County unequivocally agreed that aircraft flew through Sisolak's airspace at altitudes lower than 500 feet. Subsequently, the district court indicated that the flights would constitute a per se taking if Sisolak showed that his property was subject to overflights at altitudes lower than 500 feet.

Approximately two months later, the parties provided three items of evidence regarding the flight of aircraft below 500 feet. First, the parties filed a portion of the deposition of a McCarran Airport employee, in which the employee testified that it was "more likely than not" that, on occasion, aircraft flew over Sisolak's property at altitudes lower than 500 feet, but that he was unable to specify the exact altitudes. Second, they supplied a map depicting flight tracks for McCarran Airport that indicated that a flight track went over Sisolak's property. Third, the parties presented the County's response to Sisolak's first set of interrogatories in which the County acknowledged that "[u]pon visual observation, defendants believe that aircraft have flown over the subject property at an altitude lower than 500 feet."

The district court found that the evidence established that airplanes were flying through Sisolak's airspace at an altitude lower than 500 feet. Accordingly, the district court held that Sisolak had established a prima facie case for a per se taking, relying on *Loretto v. Teleprompter Manhattan CATV Corp.*,[9] *Kaiser Aetna v. United States*,[10] and *Nollan v. California Coastal Commission*.[11]

---

[9] 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[10] 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

[11] 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

Subsequently, the County filed a motion to amend the court's order or, in the alternative, to dismiss Sisolak's complaint. In its motion, the County argued that the order was inconsistent with the district court's prior orders and decisions, specifically, that the district court's previous decisions were premised on the use of the airspace above Sisolak's land and that the order granting summary judgment was based on the Ordinances.

Alternatively, the County argued that if the district court did not amend its order, it should dismiss Sisolak's complaint on ripeness grounds. Citing *Pennsylvania Coal Co. v. Mahon*,[12] the County argued that a regulatory takings case is only ripe for adjudication when the landowner exhausts all administrative remedies. According to the County, Sisolak had never applied for a variance; therefore, Sisolak's takings claim was not ripe for review. Sisolak opposed the motion, claiming that his argument had always been that the effect of the Ordinances was a physical invasion of his airspace, resulting in a per se takings claim and that, therefore, exhaustion of administrative remedies was not necessary. The district court denied the motion to amend.

Trial

After the district court held that the Ordinances effected a per se taking of Sisolak's private property, the matter proceeded to trial for the determination of just compensation due. The parties stipulated to dismiss all claims raised in the complaint concerning noise, dust, fumes, fuel, particles and/or vibrations caused by or resulting from the operation of aircraft over Sisolak's property.

One of Sisolak's experts testified regarding devaluation of Sisolak's property caused by the Ordinances. This expert appraised the property for its highest and best use at

---

[12] 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

$10,890,000, as of May 2001, taking into account Ordinance 728, but not Ordinances 1221 and 1599. According to this expert, the property's best use in the "before condition" would be a hotel or timeshare with a height of approximately 110-180 feet. To determine the extent of the taking, the expert subtracted the value in the "before condition" from the property's value in the "after condition," the highest and best use of the property after taking into account the height restrictions. Despite the fact that, if strictly enforced the Ordinances prevented Sisolak from building any structure exceeding 3 to 10 feet on his property, Sisolak only sought damages for the area above 66 feet, the extent of the variance previously granted by the County for the proposed Forbidden City project. As a result, the expert, working under the assumption that a developer could build to a height of 66 feet, calculated that Sisolak's property was worth $4,791,000 in the "after condition." Therefore, Sisolak's first expert concluded that the taking was worth $6,980,000.

Sisolak's second expert also concluded that the highest and best use of the property, without considering Ordinances 1221 and 1599, would be a hotel, casino or timeshare, since that was the trend in the surrounding area,[13] and that the property was worth $12,200,000 for these uses. After appraising Sisolak's property at $5,230,000 in the "after condition," with the assumption that Sisolak could build to 66 feet, this expert concluded that the taking resulted in a loss to Sisolak of $6,970,000.

The County's expert witness did not consider a smaller scale casino to be appropriate on the property, since it would mainly rely on local residents for support and the area sur-

---

[13] Across the street from Sisolak's property are two new three-story hotels. These properties do not fall within the critical departure zone. Thus, they are subject to less strict height restrictions than Sisolak's property.

rounding Sisolak's property did not have the population density necessary for such a project. According to the County's expert, the highest and best use of the property would be a commercial development, four- to five-story timeshare or hotel, such as those recently built in the vicinity. This expert appraised Sisolak's property, in the "before condition," at $6,735,000.

With respect to the Ordinances' impact, the County expert stated that they did not negatively influence Sisolak's property. After the enactment of Ordinance 1221, according to this expert, property values in the area had continued to increase and property development had commenced. Taking into consideration that more regulated property is less desirable than property with fewer restrictions, the County's expert appraised Sisolak's property at $6,535,000 in the after condition, thus estimating a loss of $200,000.

Over the County's objection, the district court instructed the jury that it "must determine the fair market value of Mr. Sisolak's property after the imposition of Ordinances 1221 and 1599, under the condition that a variance would be granted to construct a building no higher than 66 feet above ground level." The jury then returned a verdict in Sisolak's favor for $6,500,000. Subsequently, the district court entered a judgment in inverse condemnation and awarded Sisolak a total of $16,617,730.68, reflecting the $6,500,000 jury award, $107,730.68 in costs, $1,950,000 in attorney fees, and $8,060,000 in interest.

The County appeals. The American Planning Association, Air Transport Association of America, Inc., Airports Council International-North America and the Airport Authority of Washoe County filed amicus curiae briefs in support of the County's position on appeal.

DISCUSSION

We must determine whether Sisolak had a valid property interest in the airspace over his property; whether the height restrictions constituted a regulatory per se taking of the property, and whether the district court abused its discretion during trial and post-trial proceedings relating to the award of just compensation, attorney fees and costs, and prejudgment interest.

Sisolak has a valid property interest in the airspace above his land

An individual must have a property interest in order to support a takings claim.[14] Accordingly, the court must first determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, [that is,] whether the plaintiff possessed a 'stick in the bundle of property rights,'" before proceeding to determine whether the governmental action at issue constituted a taking.[15] The term "property" includes all rights inherent in ownership, including the right to possess, use, and enjoy the property.[16]

The County argues that the district court erred by finding that Sisolak has a vested property interest in the airspace above his property up to 500 feet. The County contends that neither federal nor state law recognizes a constitutionally protected property interest in the airspace above land. Further, the County argues that Sisolak had no interest in the airspace over one-half of the property based on the plain terms of the perpetual avigation easement conveyed to the County by his predecessor in interest. Accordingly, the

---

[14] *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1374 (Fed.Cir.2000).

[15] *Id.*

[16] *Black's Law Dictionary* 1252 (8th ed.2004).

County argues that no taking was possible as a matter of law. We disagree.

The Supreme Court of the United States has recognized, in its seminal case involving airspace takings, that a landowner has an interest in at least some of the airspace above his or her land.[17] In *United States v. Causby*, the Supreme Court reasoned that "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."[18]

After *Causby*, Congress redefined "navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by regulations . . . [including] airspace needed to ensure safety in takeoff and landing of aircraft."[19] Current regulations define "minimum safe altitudes" as heights of 1000 feet above the highest obstacle in congested areas or 500 feet over other than congested areas, except where necessary for takeoff or landing.[20]

Therefore, the airspace above required minimum altitudes for flight, as established in federal regulations, is in the public domain, while the ownership of the airspace below such minimum altitudes is vested in the owner of the subjacent land, who is entitled to compensation for flights invading that airspace when taken by the government. The United States Supreme Court emphasized, in *Griggs v. Allegheny County*, that although airplanes may fly below 500 feet when necessary for takeoff and landing, this right does not divest the

---

[17] *United States v. Causby*, 328 U.S. 256, 264, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

[18] *Id.* (citation omitted).

[19] 49 U.S.C. § 40102(a)(30) (2000).

[20] 14 C.F.R. § 91.119 (2006).

property owner of his protected property right to his usable airspace.[21] Rather, a landowner may still make a claim for compensation for the government's use of that airspace.[22]

This reasoning applies with equal force under Nevada law. Article 1, Section 1 of the Nevada Constitution states that acquiring, possessing and protecting property are inalienable rights. In this, it is clear that Nevadans' property rights are protected by our State Constitution. These property rights include at least the useable airspace of the subadjacent land.[23] Although NRS 493.030 declares state government sovereignty in the airspace above the land in Nevada,[24] NRS 493.040 states that "[t]he ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in NRS 493.050." Thus, the landowners own the usable airspace above their property up to 500 feet, subject to intrusion by lawful air flight.

---

[21] 369 U.S. 84, 88-89, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); *id.* at 90, 82 S.Ct. 531 ("Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.").

[22] *Ray S. Matson, et al. v. U.S.*, 145 Ct.Cl. 225, 171 F.Supp. 283 (1959).

[23] We note that at the time our Constitution was adopted in 1864, only the fixed-wing glider was in existence, and it is doubtful our framers were concerned about the use of airspace at the time. The first successful controlled powered flight by the Wright Brothers occurred in 1903.

[24] NRS 493.030 states:

> Sovereignty in the space above the lands and waters of this state is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the State.
>
> "Sovereignty" is defined, in part, as "[s]upreme dominion, authority, or rule," or "[t]he supreme political authority of an independent state." *Black's Law Dictionary* 1430 (8th ed.2004).

NRS 493.050(1)(a) states that air flight is lawful unless it interferes with the "then existing use to which the land or water, or the space over the land or water, is put by the owner." Based on the plain language of the statute, "then existing use" refers to the condition of the property when flights occur and is not intended to create a limitation or restriction on the development or use of land. Nor does the statute prohibit landowners from occupying or using their airspace up to 500 feet. To conclude otherwise would require this court to find an unspecified height restriction on all undeveloped property in Nevada. We reject that suggestion.

The statutory construction, consistent with the assurances found in our Constitution, makes the lawful right to flight subordinate to the ownership of the space above the lands. Therefore, airplanes may fly over Sisolak's property below 500 feet so long as they do not interfere with his current or future use of the property. While NRS 493.030, NRS 493.040, and NRS 493.050(1)(a) recognize lawful air flight over private property, those statutes ensure the landowners' ownership and use of their airspace up to 500 feet. It is for that reason that NRS 37.010(14) recognizes that eminent domain may be exercised for "[a]irports, facilities for air navigation and aerial rights-of-way." Thus, we conclude that Nevadans hold a property right in the useable airspace[25] above their property up to 500 feet.[26]

---

[25] Like most property rights, the use of the airspace and subadjacent land may be the subject of valid zoning and related regulations which do not give rise to a takings claim. At issue in this case is the permanent physical invasion of airspace and the resulting exclusion of the landowner therefrom caused by the Ordinances.

[26] The County argues that Sisolak never obtained a vested property right in his airspace because he failed to obtain zoning or use permit approvals to undertake a project to use the airspace, and thus his airspace was not constitutionally protected from uncompensated takings. This argument lacks merit because NRS 493.040 vests ownership in the space above land, up to 500 feet, in the owners of that property.

Further, the perpetual avigation easement conveyed to the County by Sisolak's predecessor in interest did not abrogate Sisolak's property interest in the airspace or serve as a defense to the inverse condemnation claim. We have reasoned that

> "an easement obtained by a government entity for a public use is only as broad as necessary for the accomplishment of the public purpose for which the easement was obtained and, to the extent the easement holder exceeds this right, it will be regarded as a trespasser and is responsible for damages."[27]

The easement in this case does not contain any height restriction terms but is simply an overflight easement exacted by the County to preclude liability for aircraft noise. To interpret the County's easement as permitting the use of all of Sisolak's airspace for overflights is overly broad and not narrowly crafted to accomplish the reasonable government purpose of providing flights access to and from McCarran Airport. Thus, it cannot be read to unconditionally transfer the airspace rights above Sisolak's property to the County.

Although similar avigation easements are recorded against property throughout Clark County as a condition of building permits, requiring an uncompensated easement as a condition to development is improper and cannot be used by the County as a defense to the taking of a landowner's airspace without compensation. The Supreme Court, in *Nollan v. California Coastal Commission*, reasoned that "to obtain easements of access across private property the State must proceed through its eminent domain power"[28] because "requiring uncompen-

---

[27] *S.O.C., Inc. v. The Mirage Casino-Hotel*, 117 Nev. 403, 409, 23 P.3d 243, 247 (2001) (quoting *Dixon v. City of Phoenix*, 173 Ariz. 612, 845 P.2d 1107, 1114 (Ariz.Ct.App.1992)).

[28] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

sated conveyance of [an] easement outright would violate the Fourteenth Amendment."[29] Therefore, the district court did not err in instructing the jury that the perpetual avigation easement provided no defense to the taking of Sisolak's airspace.

Although we conclude that Sisolak has a property interest in the useable airspace above his property up to 500 feet and that the district court correctly instructed the jury regarding the avigation easement, we must still consider whether the district court applied the correct legal analysis in granting summary judgment on the issue of liability.

The district court did not err when it found the County liable for a Loretto-type per se regulatory taking of Sisolak's property[30]

Whether the government has inversely condemned private property is a question of law that we review de novo.[31] We conclude that under both the United States and Nevada Constitutions, the facts of this case present a regulatory per se taking and that Sisolak is due just compensation for the government's physical invasion of his property.

The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment,[32] prohibits the government from taking

---

[29] *Id.* at 834, 107 S.Ct. 3141.

[30] The district court characterized the taking as a physical taking. As clarified by *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), and discussed in this opinion, the district court actually described a physical regulatory per se taking.

[31] *See City of Austin v. Travis County Landfill*, 73 S.W.3d 234, 241 (Tex.2002); *S.O.C., Inc.*, 117 Nev. at 407, 23 P.3d at 246.

[32] *Chicago, Burlington & Q. R'd v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

private property for public use without just compensation.[33] Article 1, Section 8(6) of the Nevada Constitution states "[p]rivate property shall not be taken for public use without just compensation having been first made, or secured."

Before 1922, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[34] However, beginning with *Pennsylvania Coal Co. v. Mahon,* the United States Supreme Court determined that state regulation of property may also require just compensation, observing that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[35] Thus, the Court developed "regulatory takings" jurisprudence under the Fifth and Fourteenth Amendments of the United States Constitution.[36] "[T]he Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment."[37]

Further, the Supreme Court defined "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes."[38] Categorical rules apply when a government regulation either (1) requires an owner to

---

[33] U.S. Const. amend. V.

[34] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551, 20 L.Ed. 287 (1871) and *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336 (1879)).

[35] 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

[36] *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886.

[37] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

[38] *Id.* at 538, 125 S.Ct. 2074.

suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property.[39] In determining whether a property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space.[40] If the regulation forces the property owner to acquiesce to a permanent physical occupation, compensation is automatically warranted, since this constitutes a per se taking. "This element of required acquiescence is at the heart of the concept of occupation."[41] The second type of per se taking, complete deprivation of value, is not at issue in this case because Sisolak never argued that the Ordinances completely deprived him of all beneficial use of his property.

"Outside these two relatively narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)."[42] While the Supreme Court has not provided a "set formula to determine where regulation ends and taking begins,"[43] it prefers to "engag[e] in . . . essentially ad hoc, factual inquiries" and established three guideposts in *Penn Central* to ex-

---

[39] *Id.* We also recognized these categorical rules in *Kelly v. TRPA*, 109 Nev. 638, 648, 855 P.2d 1027, 1033 (1993).

[40] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-23, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Yee v. Escondido*, 503 U.S. 519, 522-23, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

[41] *FCC v. Florida Power Corp.*, 480 U.S. 245, 252, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987).

[42] *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074; *see also Kelly*, 109 Nev. at 648, 855 P.2d at 1033.

[43] *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

amine whether a regulation that does not constitute a physical invasion and does not deprive the owner of all viable economic use nevertheless effects a compensable regulatory taking.[44] A court should consider (1) the regulation's economic impact on the property owner, (2) the regulation's interference with investment-backed expectations, and (3) the character of the government action.[45] In examining whether a regulatory taking has occurred, a reviewing court must consider the property as a whole.[46] Additionally, an allegation that a regulation has diminished the property's value, or destroyed the potential for its highest and best use, does not, without more, constitute a taking.[47] A *Penn Central*-type regulatory taking requires compensation only if "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regu-

---

[44] 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[45] *Id.*

[46] *Id.* at 130-31, 98 S.Ct. 2646 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."); *see also Tahoe-Sierra*, 535 U.S. at 331, 122 S.Ct. 1465 (district court erred by disaggregating property into a thirty-two month segment of time from the remainder of the property owner's fee simple estate and considering whether property owners were deprived of all economically viable use during that period).

[47] *See Euclid v. Ambler Co.*, 272 U.S. 365, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (regulations valid although they effected a seventy-five percent diminution in value of property); *Hadacheck v. Los Angeles*, 239 U.S. 394, 414, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance prohibiting highest and best use of land as a brickworks was valid, although it reduced the value of property from $800,000 to $60,000); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117, 1121 (9th Cir.1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000).

lation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."[48]

The matter is ripe for review under the regulatory per se takings analysis

As a preliminary matter, we address the County's contention that this matter is not ripe for review because the County never denied a variance. The Supreme Court has required exhaustion of administrative remedies in cases where a regulation is alleged to have gone too far in burdening private property, "'[insisting] on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.'"[49] However, the Supreme Court has reasoned that if a regulation effects an "unconditional and permanent" taking, the matter is ripe for the Court's review.[50] Further, in cases involving a physical occupation of private property, the government "has a categorical duty to compensate the former owner,"[51] and the extent of the occupation is relevant only to determine the amount of compensation due, not whether the regulation effects a taking.[52] Thus, Sisolak was not required to exhaust administrative remedies by applying for a variance before bringing his inverse condemnation action based on a regulatory per se taking of his private property.

---

[48] *Yee v. Escondido*, 503 U.S. 519, 522-23, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

[49] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1011, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986)).

[50] *Id.* at 1012, 112 S.Ct. 2886 (also reasoning that the landowner did not have to pursue any subsequently created permit procedures before his takings claim would be considered ripe).

[51] *Tahoe-Sierra*, 535 U.S. at 322, 122 S.Ct. 1465.

[52] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

Sisolak did not have to prove low and frequent overflights to establish a regulatory per se taking

With respect to takings cases involving overflights, the Supreme Court has held that when low and frequent airplane overflights substantially devalue the current use and enjoyment of property, a compensable event occurs. In *United States v. Causby,* low and frequent overflights by military aircraft destroyed a chicken farming business because the noise from the overflights caused the chickens to reduce egg production and to die from fright.[53] The Supreme Court noted that, if the flights rendered the farmer's land uninhabitable, it would be as if the government "had entered upon the surface of the land and taken exclusive possession of it."[54] Because the limitation on the land's utility profoundly diminished its value, the Court held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[55]

Further, in *Griggs v. Allegheny County,* the Supreme Court considered whether a county-operated airport took an easement over a house through noise and air pollution from frequent and low overflights.[56] The Court noted that "use of land presupposes the use of some of the airspace above it . . . . An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'"[57] Based upon evidence that the homeowners had abandoned their residence because they became "nervous and distraught" from extreme

---

[53] 328 U.S. 256, 259, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

[54] *Id.* at 261, 66 S.Ct. 1062.

[55] *Id.* at 266, 66 S.Ct. 1062.

[56] 369 U.S. 84, 85, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962).

[57] *Id.* at 89, 82 S.Ct. 531 (citation omitted) (quoting *Causby,* 328 U.S. at 265, 66 S.Ct. 1062).

noise generated by airplane overflights,[58] the Court held that the owners were due just compensation.[59]

In *Causby* and *Griggs*, landowners presented evidence of low and frequent overflights, which diminished the value of the existing use of their property. Thus, some courts have interpreted *Causby* and *Griggs* to require that a prima facie case for inverse condemnation based upon a physical taking include evidence of low and frequent overflights causing a direct and immediate interference with the enjoyment and use of the land.[60] However, *Causby* and *Griggs* did not concern the regulation of property through airport height restriction ordinances, but rather the resultant nuisance from overflights on subjacent land. Therefore, because this case does involve ordinances affecting use of property, we conclude that a regulatory per se taking occurred without resorting to the low and frequent overflight analysis. Further, Sisolak's evidence that airplanes fly lower than 500 feet above his property was sufficient proof of a permanent physical invasion of his airspace.

The ordinances effect a regulatory per se taking of Sisolak's property under the United States and Nevada Constitutions

We agree with Sisolak that, under the United States and Nevada Constitutions, the ordinances authorize the permanent physical invasion of his airspace. The ordinances exclude the owners from using their property and, instead, allow aircraft to exclusively use the airspace as a critical departure area within an airport approach zone. The essential purpose of the ordinances adopted to facilitate flights through private property is to compel landowner acquiescence.

---

[58] *Id.* at 87, 82 S.Ct. 531.

[59] *Id.* at 90, 82 S.Ct. 531.

[60] *See Brown v. U.S.*, 73 F.3d 1100, 1104 (Fed.Cir.1996); *Village of Willoughby Hills v. Corrigan*, 29 Ohio St.2d 39, 278 N.E.2d 658, 664 (1972).

In contrast to *Penn Central*-type regulatory takings cases, regulatory per se takings cases "are relatively rare, easily identified, and usually represent a greater affront to individual property rights."[61] Before its seminal physical occupation takings case, *Loretto v. Teleprompter Manhattan CATV Corp.*,[62] the Supreme Court determined that the United States Government took private property when it attempted to create a public right of access to a pond that, until substantial improvements by its private landowners, was incapable of being used as a navigable waterway.[63] In that case, *Kaiser Aetna v. United States*, the Court distinguished a taking "in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of . . . private property," from a physical invasion of private property.[64] And the Court concluded that "the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."[65] The Court further concluded that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."[66]

The Supreme Court clarified its regulatory per se takings analysis in *Loretto* when it considered "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due."[67] In *Loretto*, a New York

---

[61] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

[62] 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[63] *Kaiser Aetna v. United States*, 444 U.S. 164, 178, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

[64] *Id.* at 180, 100 S.Ct. 383.

[65] *Id.*

[66] *Id.*

[67] 458 U.S. at 421, 102 S.Ct. 3164.

statute required landlords to permit a cable television company to install cables and junction boxes in their buildings.[68] The Supreme Court held that the New York statute authorized a permanent physical occupation of the landowners' property that required compensation.[69] Although it reasoned that *Kaiser Aetna* was not a per se taking case because the easement of passage was not a permanent occupation of land, the case nevertheless "reemphasize[d] that a physical invasion is a government intrusion of an unusually serious character."[70]

Here, the district court found that the presence of aircraft over Sisolak's property at altitudes below 500 feet, as permitted by the Ordinances, constituted a permanent physical invasion of his property and was sufficient to establish a taking.[71] We agree. The district court properly concluded that Ordinances 1221 and 1599 permit airplanes to permanently invade Sisolak's property and appropriate it for public use without just compensation.

We disagree with the County's argument that the Ordinances do not require Sisolak to submit to the government's or public's use of his property since the Ordinances do not direct the flight of aircraft in any way and do not directly authorize the physical invasion of Sisolak's airspace. Al-

---

[68] *Id.* at 423, 102 S.Ct. 3164.

[69] *Id.* at 441, 102 S.Ct. 3164.

[70] *Id.* at 433, 102 S.Ct. 3164.

[71] The district court relied on *Kaiser Aetna*, *Loretto*, and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), to conclude that the ordinances effected a per se taking of Sisolak's airspace. However, as clarified by the Supreme Court in *Lingle*, *Nollan* is more appropriately deemed a land exaction case, rather than a per se taking case. However, the district court's reliance on *Nollan* is understandable because of the *Nollan* Court's discussion of physical invasions in the context of an easement. The district court's reference to *Nollan* does not alter our conclusion that the height restriction Ordinances resulted in a *Loretto*-type physical invasion taking.

though the airplanes flying over Sisolak's property are not constantly occupying the airspace in a temporal sense, the invasion is nevertheless permanent because the right to fly through the airspace is preserved by the Ordinances and expected to continue into the future. The Ordinances grant airplanes permanent permission to traverse Sisolak's airspace, and Sisolak established that airplanes fly over his property at altitudes below 500 feet. The County is using Sisolak's airspace as and when it chooses and intends to do so indefinitely. Therefore, the Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion. As a result, the County has appropriated private property for public use without compensating Sisolak and has effectuated a *Loretto*-type per se regulatory taking.

Although predating the Supreme Court's decision in *Loretto,* several state supreme courts have concluded that height restriction ordinances, almost identical to the County's, resulted in unconstitutional takings of property for public uses.[72] The New Jersey Supreme Court has considered the constitutionality of an airport zoning ordinance that restricted the height of structures within approach and turning zones.[73] The court held the ordinance unconstitutional as a taking of private property for public use, stating that "[t]he City may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain."[74]

Likewise, the Indiana Supreme Court has held that a zoning ordinance restricting the height of buildings within a

---

[72] *See Roark v. City of Caldwell,* 87 Idaho 557, 394 P.2d 641, 646-47 (1964); *Indiana Toll Road Commission v. Jankovich,* 244 Ind. 574, 193 N.E.2d 237, 242 (1963); *Yara Engineering Corporation v. City of Newark,* 132 N.J.L. 370, 40 A.2d 559 (1945).

[73] *Yara Engineering Corp.,* 40 A.2d at 560.

[74] *Id.* at 561.

specified distance of an airport, without providing for payment of compensation, unconstitutionally appropriated the property rights of the landowner in the airspace above the land.[75] The court stated that "mere regulation under the police power which can be modified at the discretion of regulating authority is wholly different from the taking or appropriating of private property by the government for a specific public use."[76]

Relying on these two cases, the Idaho Supreme Court has also concluded that the provisions of a city ordinance restricting the height of structures on the plaintiff landowner's property and limiting the use of the land constituted a taking of private property for public use, for which the city had to pay just compensation.[77]

The fact that the County enacted the Ordinances to ensure the safety of those arriving at or departing from McCarran Airport does not change the conclusion that a regulatory per se taking occurred. As the Supreme Court reasoned in *Griggs*, "'an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed.'"[78] However, in designing the airport, a local government has to acquire enough private property in order to avoid a future taking of adjacent private property for public use without just compensation.[79] Accordingly, we conclude that under federal law the Ordinances effectuated a *Loretto*-type regulatory per se taking of Sisolak's property, entitling Sisolak to just compensation.

---

[75] *Jankovich*, 193 N.E.2d at 242.

[76] *Id.* at 241.

[77] *Roark*, 394 P.2d at 646-47.

[78] 369 U.S. 84, 90, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962) (quoting *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 348 P.2d 664, 671 (1960)).

[79] *Id.*

Our dissenting colleagues conclude that a *Penn Central*-type regulatory taking has occurred as a result of the height restrictions imposed by the County Ordinances. This conclusion is not unreasonable, given the difficulty in applying the federal takings jurisprudence. We, therefore, take this opportunity to clarify what constitutes a regulatory per se taking under our State Constitution.[80] When it comes to interpreting a state constitution, we have recognized that "states may expand the individual rights of their citizens under state law beyond those provided under the Federal Constitution."[81] Similarly, the United States Supreme Court has emphasized that a state may place stricter standards on its exercise of the takings power through its state constitution or state eminent domain statutes.[82]

The first right established in the Nevada Constitution's declaration of rights is the protection of a landowner's inalienable rights to acquire, possess and protect private property.[83] There is no corollary provision in the United States Constitution. Article 1, Section 8(6) of the Nevada Constitution requires the government to make or secure just compensation before taking private property. Early in our state's history, this court recognized that "[t]he property of a citizen can only be taken by an act of the legislature for a public use,

---

[80] Contrary to the suggestion by one of our dissenting colleagues that the parties did not litigate whether there was a taking under our State Constitution, the matter was raised in the proceedings below and in supplemental briefs before this court that include extensive discussion of the Nevada constitutional debates.

[81] *State v. Bayard*, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003).

[82] *Kelo v. City of New London*, 545 U.S. ----, ----, 125 S.Ct. 2655, 2668, 162 L.Ed.2d 439 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline.").

[83] Nev. Const. art. 1, § 1.

when a necessity exists therefor, and when compensation to the owner has first been made or secured."[84] The constitutional requirement that the government must first make or secure just compensation before taking private property "is a personal [right] for the benefit of the property owner and subject to being waived by him."[85] The rights of property owners are "constitutionally satisfied when they receive just compensation for their properties."[86]

In this, the Nevada Constitution contemplates expansive property rights in the context of takings claims through eminent domain. The drafters of our Constitution imposed a requirement that just compensation be secured prior to a taking, and our State enjoys a rich history of protecting private property owners against government takings. To clarify regulatory takings jurisprudence under the Nevada Constitution, a per se regulatory taking occurs when a public agency seeking to acquire property for a public use enumerated in NRS 37.010, fails to follow the procedures set forth in NRS Chapter 37, Nevada's statutory provision on eminent domain, and appropriates or permanently invades private property for public use without first paying just compensation.[87] Thus, the

---

[84] *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 399 (1876).

[85] *Saunders v. State*, 70 Nev. 480, 485, 273 P.2d 970, 972 (1954).

[86] *Urban Renewal Agcy. v. Iacometti*, 79 Nev. 113, 127, 379 P.2d 466, 473 (1963).

[87] See also NRS 497.270(1), stating that in cases where

> (b) The approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this chapter; or
>
> (c) It appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the political subdivision within which the property or nonconforming use is located, or the political subdivision owning the airport or served by it may acquire, by purchase, grant or condemnation in the manner provided by the law

adoption of ordinances that established a permanent physical invasion of the airspace above Sisolak's property, thereby appropriating the airspace for the County's use, effectuated a per se taking of his property under the Nevada Constitution.[88]

The district court did not abuse its discretion during its trial and post-trial proceedings

Because the district court did not err in holding the County liable for a per se taking of Sisolak's airspace, Sisolak was entitled to just compensation.[89] We conclude that the district court did not abuse its discretion during its trial and post-trial proceedings on just compensation, attorney fees, costs, and interest. First, the district court properly instructed the jury regarding the maximum allowable building height on the property. Second, the district court had a valid basis for its

---

under which political subdivisions are authorized to acquire property for public purposes, such air right, avigation easement or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this chapter.

[88] We reject the County's contention that the government cannot afford to regulate by purchase in matters concerning public safety. First, the County is in a position to trade public property for other suitable property needed for airport operations. Second, the record indicates that only a limited number of property owners are affected by the most onerous restrictions in Ordinances 1221 and 1599, while the remaining property is already owned by McCarran Airport or the University of Nevada, Las Vegas. Further, a McCarran Airport representative acknowledged that it is ultimately the airlines that would pay a judgment in an eminent domain proceeding, not the taxpayers, and any judgments against the County will not likely materially affect its financial condition. Finally, any financial burden that the County must bear as a result of having to pay just compensation is irrelevant to the inquiry under the United States and Nevada Constitutions as to whether the regulations effected a per se taking of private property.

[89] *See Clark County v. Sun State Properties*, 119 Nev. 329, 335, 72 P.3d 954, 958 (2003) (stating that state and federal constitutional law requires the payment of just compensation to the property owner).

award of attorney fees and costs. Finally, the district court did not abuse its discretion by awarding prejudgment interest. Accordingly, we affirm the district court's award of compensation, attorney fees and costs, and prejudgment interest.

The district court did not abuse its discretion by instructing the jury that 66 feet was the maximum allowable building height on the property

The County contends that the district court caused an inflated compensation award by erroneously instructing the jury that 66 feet was the maximum allowable building height on the property. Specifically, the County argues that the district court should not have negated the trial testimony of their obstruction and hazard expert, which implied that Sisolak could obtain a variance of more than 66 feet.[90] We conclude that, because the County's expert based his opinion on FAA regulations rather than the height restrictions imposed by the Ordinances, the district court did not abuse its discretion by excluding the expert's testimony from the jury's consideration.

"Constitutional principles provide that just compensation is measured by the fair market value of the condemned property."[91] "[T]he market value of the property should be determined by reference to the highest and best use for which the land is available and for which it is plainly adaptable."[92] However, the highest and best use must be "reasonably prob-

---

[90] The County's expert testified that at the property's four corners, the maximum building height that would not create an aviation hazard, when applying the most restrictive criteria used by the FAA, was 102 feet at the northwest corner, 115 feet at the southwest corner, 127 feet at the northeast corner, and 196 feet at the southeast corner.

[91] *Sun State Properties*, 119 Nev. at 335, 72 P.3d at 958.

[92] *County of Clark v. Alper*, 100 Nev. 382, 386-87, 685 P.2d 943, 946 (1984).

able."[93] In determining fair market value, the trier of fact may consider "any elements that fairly enter into the question of value which a reasonable businessman would consider when purchasing."[94]

Although evidence regarding variance procedures is irrelevant to establish whether a property owner is entitled to compensation for a regulatory per se taking, such evidence is still relevant in calculating the amount of compensation due.[95] Evidence of future changes affecting the property, such as variances or zoning ordinances, is admissible to determine the amount of compensation due if the change is reasonably probable. For example, in *City of Las Vegas v. Bustos,* the district court determined that, given the changes in the neighborhood and surrounding properties, it was reasonably likely that a prospective buyer of the property in question could obtain a zoning change from residential to commercial.[96] Additionally, we concluded that "[t]he trier of fact may consider the effect of future rezoning or variances on the highest and best use of the condemned property when determining its value."[97] We noted that there was "undisputed evidence" that the city had converted most of the land surrounding the property, zoned residential, to commercial use.[98]

---

[93] *City of Las Vegas v. Bustos,* 119 Nev. 360, 362, 75 P.3d 351, 352 (2003).

[94] *State ex rel. Dep't Hwys. v. Linnecke,* 86 Nev. 257, 261-62, 468 P.2d 8, 10-11 (1970), *quoted in Sun State Properties,* 119 Nev. at 335, 72 P.3d at 958.

[95] *Tahoe-Sierra,* 535 U.S. at 322, 122 S.Ct. 1465 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (citations omitted)).

[96] 119 Nev. at 361-62, 75 P.3d at 351-52.

[97] *Id.* at 362, 75 P.3d at 352.

[98] *Id.* at 363, 75 P.3d at 353.

As a result, we concluded that the district court properly relied on that evidence in making its award of compensation.

Here, the County's expert testimony regarding maximum building heights under FAA regulations was irrelevant because the County Ordinances imposed more stringent height restrictions on Sisolak's property. Therefore, the jury did not have to consider whether the County would approve a variance application from Sisolak for more than 66 feet in determining just compensation for the taking. The district court properly based the jury instruction on valuation testimony given by both the County's and Sisolak's appraisers, who calculated the difference in value to the property by relying on the previously granted variance of 66 feet. Accordingly, we affirm the award of damages.

The district court did not abuse its discretion by awarding attorney fees and costs

We have established that a landowner has no constitutional right to recover attorney fees as a part of the just compensation for land taken by eminent domain.[99] Neither does NRS Chapter 37, Nevada's eminent domain statute, provide for attorney fees except upon abandonment of the action by the condemnor.[100] Although we will not disturb a district court's award of attorney fees and costs absent an abuse of discretion, the award must be authorized "by a statute, rule or contract."[101] We conclude that the district court properly based its award of attorney fees on a relevant provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Relocation Act).[102]

---

[99] *Lamar v. Urban Renewal Agency*, 84 Nev. 580, 581, 445 P.2d 869, 870 (1968).

[100] *Id.*

[101] *U.S. Design & Constr. v. I.B.E.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

[102] 42 U.S.C. §§ 4601-4655 (2000).

The Relocation Act requires that a state government entity receiving federal funds institute formal condemnation proceedings to acquire any interest in real property by exercising the power of eminent domain.[103] Further, the Relocation Act states that the court "shall" award "reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings" only when "the final judgment is that the . . . agency cannot acquire the real property by condemnation; or . . . the proceeding is abandoned."[104] However, plaintiffs may recover attorney fees and costs if they succeed in an inverse condemnation claim against the government.[105] As one federal court has recognized, "[i]t is inevitable that the successful plaintiff in the . . . inverse condemnation action will be forced to pay greater litigation expenses than would have been necessary if the [state or] federal agency had properly performed its function and condemned the property in question."[106] Therefore, this provision is an attempt by Congress "to rectify this situation . . . by allowing recovery of litigation expenses for a successful plaintiff in an inverse condemnation action."[107]

The provisions of the Relocation Act apply to all Nevada political subdivisions and agencies.[108] In particular, NRS 342.105(1) provides that

> [a]ny department, agency, instrumentality or political subdivision of this State, . . . which is subject to the provisions of the federal [Relocation Act], and the regu-

---

[103] *See id.* § 4651(8) ("No [recipient airport] shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.").

[104] *Id.* § 4654(a).

[105] *Id.* § 4654(c).

[106] *Pete v. United States*, 215 Ct.Cl. 377, 569 F.2d 565, 568 (1978).

[107] *Id.*

[108] NRS 342.105(1).

> lations adopted pursuant thereto, and which undertakes *any project that results in the acquisition of real property* or in a person being displaced from his home, business or farm, shall provide relocation assistance and make relocation payments to each displaced person and perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements.

(Emphasis added.)

The provisions of NRS Chapter 342 apply when "the public body administering the programs or projects [is] funded in whole or in part by the federal government."[109] In *County of Clark v. Alper*, we reversed the award of attorney fees to the owner of property taken by the county to widen a public street because the owner failed to show that the county received federal financial assistance to pay for all or any part of the project.[110]

We disagree with the County's argument that, in order for the Relocation Act to apply, there must be a specific nexus between the federal funding and the taking at issue as well as landowner displacement. Here, the Relocation Act entitles Sisolak to an award of attorney fees because the County received federal funding for numerous improvements at McCarran Airport, including runway reconstruction and land acquisition. The County was eligible to receive the federal funding specifically because it made assurances that it took steps, by enacting the Ordinances, to protect the airspace needed for aerial approaches to the airport and to prevent future construction into that airspace.[111]

---

[109] *County of Clark v. Alper*, 100 Nev. 382, 396, 685 P.2d 943, 952 (1984).

[110] *Id.*

[111] *See* 49 U.S.C. § 47107(a)(10) (2000) (stating that the approval of a project grant application is conditioned on assurances regarding airport

Further, the Relocation Act does not limit eligibility for attorney fees to persons who have actually been displaced and who require relocation assistance. Because Sisolak is a property owner who was successful in his inverse condemnation action, the plain terms of the Relocation Act allowed the district court to award reasonable attorney fees and costs. Therefore, we conclude that the district court did not abuse its discretion by awarding Sisolak attorney fees and costs.

The district court did not abuse its discretion by awarding prejudgment interest

The district court followed our decision in *Alper* when it awarded prejudgment interest from the date the County passed Ordinance 1221 until the district court entered its judgment in the case. In *Alper*, we reasoned that "[w]here the market value of the property is not paid contemporaneously with the taking, the owner is entitled to interest for the delay in payment from the date of the taking until the date of the payment."[112] An award of prejudgment interest "compensate[s] the landowner for the delay in the monetary payment that occurred after the property had been taken."[113] We conclude that the district court did not abuse its discretion by awarding prejudgment interest.

CONCLUSION

The district court correctly concluded that the presence of aircraft over Sisolak's property at altitudes lower than 500 feet AGL, as permitted by the Ordinances, constituted a physical invasion of his private property. Sisolak suffered a

---

operations including assurances that "appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations").

[112] 100 Nev. at 392, 685 P.2d at 950.

[113] *Id.*

Loretto-type regulatory per se taking under both the United States and Nevada Constitutions because Ordinances 1221 and 1599 appropriated his private property for a public use without the payment of just compensation. The Ordinances deny Sisolak his right to exclude others from his private property and instead require that Sisolak acquiesce to a permanent physical invasion of his property. Finally, the *Penn Central*-type takings analysis does not govern this action. Accordingly, we order the judgment of the district court affirmed.

GIBBONS, DOUGLAS, PARRAGUIRRE, *JJ.*, and AGOSTI, *Sr. J.*, concur.

BECKER, *J.*, dissenting in part and concurring in part.

As a preliminary matter, I dissent to parts of the majority opinion that take statements out of context from *United States v. Causby*[1] and *Griggs v. Allegheny County*[2] to conclude that the mere presence of aircraft flying below 500 feet above ground level constitutes a physical occupancy of Sisolak's property. Neither case found that aircraft overflights, takeoffs or landings, in and of themselves, constitute a taking under the Fifth Amendment of the United States Constitution. Rather, it was the effect of the planes upon the owners' property that resulted in a taking. Likewise, the majority states that a regulation which requires the granting of an easement is automatically a taking under *Nollan v. California Coastal Commission.*[3] However, *Nollan* only holds that such a requirement may be a taking if the easement does not relate to the health, safety or welfare purpose of the regulation or is overly broad to accomplish that purpose.

Second, I dissent from the majority opinion's application of *Loretto v. Teleprompter Manhattan CATV Corp.*[4] to support its conclusion that a taking occurred in this case under the Federal Constitution. I believe that the correct federal analysis requires the use of *Penn Central Transportation Co. v. New York City.*[5]

I concur with the majority that a broader interpretation of the principles articulated in *Loretto* or *Penn Central* for airport approach zone cases may be warranted under the Nevada Constitution for two reasons: (1) commercial aircraft

---

[1] 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

[2] 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962).

[3] 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

[4] 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[5] 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

did not exist in 1864; and (2) prior to the Supreme Court's holding in *Causby*, landowners were generally considered to have an infinite interest in adjacent airspace.[6] Moreover, it is true that, at the time of the Nevada Constitution, the idea of a regulatory taking did not exist. It was created by the U.S. Supreme Court in the seminal case of *Pennsylvania Coal Co. v. Mahon*.[7] Finally, the establishment of landing patterns and approach zones and the regulation of physical structure heights in such zones necessarily regularly funnels aircraft over particular pieces of property rather than impacting all landowners in an airport's vicinity.

However, I dissent from the broad statement that our eminent domain provision was intended to give landowners greater protection than that given under the Fifth Amendment of the United States Constitution. This contradicts over a century of precedent. In addition, other than general statements that the County Ordinances violated the Federal and State Constitutions, Sisolak never provided any analysis to support an argument that the Nevada Constitution provides more expansive rights under eminent domain. Such a broad, sweeping holding, without any reference to Nevada's constitutional debates or other significant supporting analysis, is unwise and unwarranted.[8]

For the reasons stated below, I do not agree that the County Ordinances in question, 1221 and 1599, authorize the physical invasion of Sisolak's property in violation of *Loretto*.

---

[6] *Causby*, 328 U.S. at 260-61, 66 S.Ct. 1062.

[7] 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

[8] In fact, a review of the Nevada constitutional debates indicates that the language added to the Nevada Constitution regarding compensation being "made, or secured" was intended to protect the government, not the landowner. *See* Debates & Proceedings of the Nevada State Constitutional Convention of 1864, at 60-63 (Andrew J. Marsh off. rep., 1866).

Instead, the appropriate taking analysis is governed by the Supreme Court's opinion in *Penn Central.* Although, as discussed below, the Ordinances contain aspects that are troubling under *Penn Central,* neither side had the opportunity to fully litigate this case pursuant to *Penn Central.* Therefore, to be fair to all parties, I would remand the case to the district court with instructions to apply *Penn Central* after giving the parties time to present any additional evidence relevant to a *Penn Central* analysis. In addition, on remand, the parties could present additional arguments or analysis of how airport approach zones should be treated under the Nevada Constitution, through a broader reading of *Loretto* or *Penn Central.*

Lingle analysis of takings cases

To avoid confusion in future cases, the U.S. Supreme Court clarified its eminent domain jurisprudence involving the relationship between land use regulations and the Fifth Amendment in *Lingle v. Chevron U.S.A. Inc.*[9] The *Lingle* Court delineated the elements necessary to establish a taking under each of the four different theories recognized by the Court involving land use regulations.[10] The Court noted that the four theories are encompassed in four cases, *Lucas v. South Carolina Coastal Council,*[11] *Loretto, Penn Central* and *Nollan.*[12] Each theory has key elements, which the Supreme Court outlined.

For a *Lucas* taking, the landowner must demonstrate that the regulation completely deprives the owner of all economically beneficial use of the property.[13] *Loretto* involves

---

[9] 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

[10] *Id.* at 538-39, 546-48, 125 S.Ct. 2074.

[11] 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[12] *Lingle*, 544 U.S. at 538, 546-47, 125 S.Ct. 2074.

[13] *Id.* at 538, 125 S.Ct. 2074.

regulations that allow a permanent physical invasion of a landowner's property by the government or third parties.[14] A *Nollan* taking occurs when the granting of a land use application is conditioned upon concessions by a landowner, such as an easement, that go beyond the scope of the governmental interest the regulation is designed to protect.[15] Finally, *Penn Central* is used to analyze any regulation that does not fit in the other three categories. Under *Penn Central*, the effect of the regulation on a piece of property is measured on a case-by-case basis using several factors to determine whether the regulation constitutes a taking.[16]

Sisolak agrees that *Lucas* does not apply to his property since the Ordinances do not destroy all beneficial use of the property. He argues instead that granting height variances conditioned upon conveyance of an avigation easement under Ordinances 1221 and 1599 constitutes an unconstitutional exaction under *Nollan* and that the creation of approach zones and critical approach zones by the Ordinances permits planes to physically invade his property in violation of *Loretto*. Sisolak contends that a combination of these actions amounts to a taking. However, under *Lingle* and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[17] these theories cannot be combined to effect a taking.

I concur with Sisolak that the avigation easements imposed by Clark County against his property in the past, and as a condition of a variance grant in 2001, are unconstitutional exactions under *Nollan*. Ordinances 1221 and 1599 impose height restrictions to avoid creating aviation hazards for planes landing or taking off from McCarran Airport. The avigation easements go beyond this purpose because they also

---

[14] *Id.*; *Loretto*, 458 U.S. at 440, 102 S.Ct. 3164.

[15] *Lingle*, 544 U.S. at 546-47, 125 S.Ct. 2074.

[16] *Id.* at 538-39, 125 S.Ct. 2074.

[17] 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

protect McCarran from future claims that noise and fumes from aircraft are creating a nuisance or destroying the existing use and enjoyment of the property.[18] However, Sisolak has failed to demonstrate any damages resulting from the overly broad easements because the easements themselves do not prohibit building above a certain height. Thus, he has no takings claim until the government attempts to enforce the easement. Rather, his remedy at this time is to invalidate the easement. It cannot be used to support the damage award below. His claim must be analyzed under *Loretto* or *Penn Central*.

Loretto inapplicable

The United States Supreme Court has emphasized that *Loretto* takings are a narrow category of takings.[19] To constitute a taking under *Loretto*, a regulation must grant, on its face; the government or a third party rights in the plaintiff's property.[20] A regulation that simply limits what a landowner can do with his or her property does not amount to a taking under *Loretto*.[21] Ordinances 1221 and 1599 impose building height restrictions upon property located within zones relating to runways at McCarran and other airports. They do not, on their face, establish any easement or other right to use a landowner's property.

While the majority is correct that landowners have an interest in the airspace adjacent to their real property, the

---

[18] In essence, protecting the government from a future claim of inverse condemnation under *Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206.

[19] *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074.

[20] 458 U.S. at 426-28, 102 S.Ct. 3164.

[21] *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (holding rent control regulations are not a physical invasion under *Loretto* because they only regulate what landowners can do with their property, they do not compel a landowner to lease property to any particular person).

right only exists to the extent necessary to the landowner's use and enjoyment of the property. The landowner does not have a separate interest in the air itself. As the Supreme Court said in *United States v. Causby*:

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.[22]

The majority opinion is flawed when it concludes that creation of an approach zone gives aircraft the right to use Sisolak's airspace. The aircraft are entitled to use airspace below 500 feet above ground level for takeoff and landing, and a landowner's use of the airspace is concurrent with the right of aircraft overflights pursuant to federal[23] and state law.[24] The majority refers to these statutes but then ignores them to conclude that the Ordinances permit the planes to invade the airspace.

Of course this is not to say that aircraft may fly over a property with impunity. Where aircraft operations interfere with a property's existing use, a claim for nuisance or inverse condemnation may exist based upon the extent of the damage created by the overflights.[25] In addition, like any other regulation, airport height restriction regulations may go too

---

[22] 328 U.S. at 266, 66 S.Ct. 1062.

[23] 49 U.S.C. § 40102(a)(30) (2000).

[24] NRS 493.030, 493.040 and 493.050(1)(a).

[25] *Causby*, 328 U.S. at 262-64, 66 S.Ct. 1062.

far and result in a claim for inverse condemnation under the guidelines set forth in *Penn Central.*

Penn Central analysis

When a regulation does not fall within one of the limited physical takings cases, it may still constitute a taking requiring compensation under *Penn Central. Penn Central* employs a fact-intensive ad hoc analysis to determine whether the impact of a regulation upon property rises to the level of a constitutional taking. As noted by the majority, the Supreme Court has identified several factors to be considered in *Penn Central* cases: (1) does the regulation impose restrictions generally upon all property within an area, or does it target certain landowners; (2) is the regulation designed to benefit a particular government project or enterprise; and (3) does the regulation destroy the landowner's investment-backed expectations in the property.[26] No one factor is controlling in the analysis.[27] In addition, before a claim under *Penn Central* may be litigated, the impact of the regulation on the property must be established.[28] Regulations that rely on government action to determine the effect of the regulation upon the property (such as variance procedures) are not ripe for court action until limits of the regulation are established.[29]

The County alleges that Sisolak's claim for inverse condemnation is not ripe for adjudication because Sisolak's only request for a variance was granted and there has been no definitive determination of how high a structure may be built upon the property. I disagree. The record reflects that the district court found, based upon affidavits and live and depo-

---

[26] 438 U.S. at 124, 98 S.Ct. 2646.

[27] *Palazzolo v. Rhode Island*, 533 U.S. 606, 634, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (O'Connor, J., concurring).

[28] *Id.* at 619-21, 121 S.Ct. 2448 (majority opinion).

[29] *Id.*

sition testimony, that Sisolak could not build a structure exceeding sixty-six feet above ground level.[30] Although the County presented contrary evidence, weight and credibility decisions lie within the discretion of the district court.[31] Substantial evidence supports the district court's finding,[32] and thus, the matter is ripe for adjudication under *Penn Central*.

Several aspects of the Ordinances are troubling under *Penn Central*; namely, evidence suggests that the regulations were designed to (1) benefit a particular government project, the expansion of McCarran Airport; (2) avoid eminent domain proceedings; and (3) create approach zones that may burden specific pieces of property for a benefit conveyed to all property owners in Clark County. Moreover, the variance procedure is conditioned on an unconstitutional exaction easement. However, Sisolak presented no evidence on how the Ordinances impacted his investment-backed-expectations. Because no factor is controlling and *Penn Central* requires a weighing of the factors, fairness requires allowing all parties to present any additional evidence that they may have before a final takings determination is made. I would therefore remand the case for further proceedings under *Penn Central*.

I concur with the majority holding that actual relocation is not necessary to award fees under the federal relocation act so long as the record establishes a nexus that the ordinances

---

[30] When deciding jury instructions, the district court concluded that the County's evidence supporting heights exceeding one hundred feet above ground level was too speculative and instructed the jury that no building would be permitted above sixty-six feet above ground level. Although this was improper under *Loretto*, and the district court did not review the evidence for futility or exhaustion under *Penn Central*, given his statements, I see no point in remanding the case for this purpose as his ruling clearly reflects his findings regarding the evidence.

[31] *See City of Las Vegas v. Bustos*, 119 Nev. 360, 365, 75 P.3d 351, 354 (2003).

[32] *See id.*

were enacted to further a particular project and that project is federally funded. I also concur in the conclusions regarding prejudgment interest.

MAUPIN, J., *dissenting*.

While I agree with the majority that this inverse condemnation action must be resolved under a regulatory takings analysis, I disagree that a per se regulatory taking has occurred. In my view, the district court should have ordered the parties to litigate this takings claim under *Penn Central Transportation Co. v. New York City*.[1]

DISCUSSION

Regulatory takings

In line with the United States Supreme Court's recent decision in *Lingle v. Chevron U.S.A. Inc.*,[2] regulatory takings occur under federal takings jurisprudence when the government requires an owner to suffer a permanent physical invasion of property (*Loretto v. Teleprompter Manhattan CATV Corp.*),[3] when a regulation completely deprives an owner of "all economically beneficial use" of property (*Lucas v. South Carolina Coastal Council*),[4] when a regulation requires the conditioning of land use beyond that which the regulation is designed to protect (*Nollan v. California Coastal Commission*),[5] or when a regulation, which does not deprive the owner of all viable economic use, impacts the property to the degree that it interferes with legitimate property interests (*Penn Central*).[6] When the regulation at issue does not fit within the first three categories, the takings claim must be resolved under *Penn Central*.[7]

---

[1] 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[2] 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

[3] 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking).

[4] 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[5] 483 U.S. 825, 831-32, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

[6] 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[7] *See Lingle*, 544 U.S. at 538, 125 S.Ct. 2074.

As stated in *Lingle*:

> Although our regulatory takings jurisprudence cannot be characterized as unified, [the three] inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[8]

The majority agrees that neither a *Lucas* nor *Nollan* taking has occurred. Rather, it concludes that, under *Loretto*, the height restriction ordinances at issue effected a permanent physical invasion of the subject property.

In my view, because the air traffic over this property comes and goes, the Ordinances in question have not operated as a permanent physical ouster. Rather, they establish height restrictions to buildings that are subject to a variance process. Accordingly, I conclude that *Loretto*, *Lucas* and *Nollan* are not implicated. Under this analysis, the matter should be remanded for resolution under *Penn Central* for determinations concerning (a) the regulations' economic impact, (b) the regulations' interference with investment-backed expectations, and (c) the character of the government action.[9] As discussed below, such a resolution would be subject to a preliminary determination of ripeness.

---

[8] *Id.* at 539, 125 S.Ct. 2074.

[9] *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646.

Ripeness

Exhaustion

A regulatory takings claim under *Penn Central* is generally not ripe without exhaustion of administrative remedies resulting in a "final decision" regarding the property owner's ability to develop his property.[10] In *Williamson Planning Commission v. Hamilton Bank*, the Supreme Court observed:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.[11]

The final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer."[12] Accordingly, without a final regulatory decision applying the challenged regulation, a court cannot evalu-

---

[10] *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[11] *Id.* at 190-91, 105 S.Ct. 3108 (citations omitted).

[12] *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

ate the economic impact of the regulation with regard to the extent it interferes with reasonable investment-backed expectations and, thus, cannot conduct the *Penn Central* examination without resorting to speculation.[13] A final decision requires, at a minimum, "(1) a rejected development plan, and (2) a denial of a variance."[14] Further, the application for development must be one that is meaningful, *i.e.*, not one that is for "'exceedingly grandiose development.'"[15] Additionally, government "may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[16]

While I disagree with the majority that a regulatory per se taking has occurred in this instance, I do agree that *Loretto* and *Lucas* takings, like per se physical takings, do not require exhaustion of administrative remedies. However, because I conclude that the takings issue in this case should be resolved under *Penn Central*, the landowner, in my view, was required to prove to the trial court that he had exhausted his administrative remedies by submitting at least one plan for approval. In this case, the landowner concedes that he did not

---

[13] *Hamilton Bank*, 473 U.S. at 191, 105 S.Ct. 3108.

[14] *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.1987) (even if a landowner has submitted development plans and been rejected, an applied regulatory taking case might still not be ripe; a landowner must submit a "meaningful" application for development); *see MacDonald*, 477 U.S. at 353 n. 9, 106 S.Ct. 2561 ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.").

[15] *Kinzli*, 818 F.2d at 1455 (the futility exception is not triggered until at least one meaningful application for development is submitted and rejected; "[a] 'meaningful application' does not include a request for 'exceedingly grandiose development'" (quoting *MacDonald*, 477 U.S. at 353 n. 9, 106 S.Ct. 2561)).

[16] *Palazzolo v. Rhode Island*, 533 U.S. 606, 621, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

exhaust his administrative remedies before trial and that he cannot do so now.[17]

Futility

A limited exception exists to "the final decision [exhaustion] requirement if attempts to comply with that requirement would be futile."[18] However, as one court has explained, a landowner seeking to establish futility carries the burden of proving that the exception applies. The landowner must establish that the potential denial of a development permit is more than a mere possibility; rather, "a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)."[19] Thus, for example, in *Lucas*, the Court noted that it would have been futile for the landowner to submit a request for a "special permit" when the regulatory agency stipulated that it would not grant such a permit.[20]

Because the height restriction ordinances here are subject to variance procedures, and because the evidence in the record that might support a claim of futility was largely speculative, in particular, the testimony of the Clark County Department of Aviation planner concerning hypothetical projects, I would remand this matter for a new trial, during which the district court would assess the probative value of the evidence under the above futility analysis. Assuming an adequate showing of futility, the district court would then conclude the litigation under the *Penn Central* criteria.

---

[17] The parties agree that the landowner has sold the subject property to a third party.

[18] *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir.1988); *see also Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir.1996).

[19] *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir.1991) (citations omitted).

[20] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n. 3, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

CONCLUSION

I realize that the majority has determined to apply state constitutional principles to this takings analysis. This is certainly a reasonable approach. Having said this, I do not believe it necessary to deviate from federal takings jurisprudence to justly evaluate whether a compensable regulatory taking has occurred and whether the matter is ripe for such a determination.[21] Thus, while I believe that the landowner can make out a regulatory takings case, he should do so under *Penn Central*.

---

[21] I wish to note my vigorous agreement with the majority's conclusion that the perpetual avigation easement conveyed to the County by Mr. Sisolak's predecessor did not abrogate his property interest in the airspace over the subject parcels. In my view, the County's arguments in that regard were completely without merit.

I finally agree that actual relocation is not necessary to award the landowner fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.

APPENDIX B

DISTRICT COURT
CLARK COUNTY, NEVADA

[Filed Jun. 11, 2003]

Case No. A434337
Department No. XIII

STEVE SISOLAK,

Plaintiff,

vs.

MCCARRAN INTERNATIONAL AIRPORT and CLARK COUNTY, a political subdivision of the State of Nevada,

Defendants.

JUDGMENT IN INVERSE CONDEMNATION

The jury trial in this action commenced on February 19, 2003. On March 7, 2003, the jury returned a verdict of six million five hundred thousand dollars in compensation for the taking of Plaintiff's airspace by the imposition of height restrictions imposed on his property by ordinance 1221 and 1599.

Following trial, the parties presented, by briefing and argument, issues to this Court for determination. For the reasons set forth in this Court's May 23, 2003 Decision, the Court has determined those issues as follows:

1. Plaintiff is entitled to pre-judgment interest on the judgment from August 1, 1990 until the judgment is paid. The interest to which Plaintiff is entitled is simple interest. The rate is the prime rate plus two percent adjusted on January 1 and July 1 each year from August 1, 1990 until the judgment is paid. As of June 30, 2003,

the prejudgment interest to which plaintiff is entitled is $8,060,000.00.

2. Plaintiff is entitled to $107,730.68, in costs in this case.

3. Plaintiff is entitled to $1,950,000.00 in attorney's fees.

NOW THEREFORE, IT IS HEREBY ORDERED ADJUDGED AND DECREED AS FOLLOWS:

1. The airspace above 66 feet over the current ground level of Plaintiff's property, as more specifically described in attached Exhibit A, is hereby condemned by Defendants for public use as authorized by law.

2. A judgment against defendants, and each of them, shall be and is hereby entered in favor of plaintiff in the amount of $6,500,000.00 for the taking of his airspace, $8,060,000.00 in prejudgment interest, $107,730.68 in costs and $1,950,000.00 in attorney's fees, for a total judgment amount of $16,617,730.68. Post judgment interest will accrue on that amount from July 1, 2003 until paid pursuant to NRS 17.130(2).

3. Upon payment of the judgment in full, including all post-judgment interest which shall hereafter accrue, defendants shall be entitled to, and this Court shall enter, a final order of condemnation which will vest ownership of the airspace above 66 feet above the current ground level of Plaintiff's property, as more specifically described in attached Exhibit A. The final order of condemnation cannot be entered pending appeal. NRS 37.009(2)

/s/ Mark R. Denton
MARK A. DENTON
DISTRICT COURT JUDGE

Submitted by:

/s/ Laura Fitzsimmons
LAURA FITZSIMMONS
Attorney for Plaintiff

Approved as to form by:

/s/ Jones Vargus
JONES VARGUS
Attorney for Defendants

EXHIBIT A

PARCEL 1:

Government Lots 120, 122 and 173 in Section 5, Township 22 South, Range 61 East, M.D.M. Clark County, Nevada.

Excepting therefrom the North Thirty (30.00) feet of the West 100.00 feet of Government Lot 173 as described in Resolution of Relinquishment to Clark County recorded January 21, 1982 in Book 1513 as Document No. 1472121, Official Records.

Subject to the Federal Aid Highway under the Act of November 9, 1921 (42 Stat. 212) over the Easterly 100.00 feet of Government Lot 173.

PARCEL 2:

Government Lots 121 and 123 in Section 5, Township 22 South, Range 61 East, M.D.M., Clark County, Nevada.

PARCEL 3:

Government Lot 174 in Section 5, Township 22 South, Range 61 East, M.D.M., Clark County, Nevada.

Excepting therefrom the South Thirty (30.00) feet of the West 100.00 feet as described in Resolution and Relinquishment to Clark County recorded January 21, 1982 in Book 1513 as Document No. 1472121, Official Records.

Subject to Federal Aid Highway under the Act of November 9, 1921 (42 Stat. 212) over the Easterly 100.00 feet thereof.

APPENDIX C

FEDERAL STATUTES

42 U.S.C. § 4654. Litigation expenses

(a) Judgment for owner or abandonment of proceedings

The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the United States.

(b) Payment

Any award made pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was[1] instituted.

(c) Claims against United States

The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, ap-

[1] So in original. Probably should be "were".

praisal, and engineering fees, actually incurred because of such proceeding.

42 U.S.C. § 4655. Requirements for uniform land acquisition policies; payments of expenses incidental to transfer of real property to State; payment of litigation expenses in certain cases

(a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

(b) For purposes of this section, the term "acquiring agency" means—

(1) a State agency (as defined in section 4601(3) of this title) which has the authority to acquire property by eminent domain under State law, and

(2) a State agency or person which does not have such authority, to the extent provided by the head of the lead agency by regulation.

49 U.S.C. § 40102. Definitions

(a) General definitions.—In this part—

* * * *

(32) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

* * * *

49 U.S.C. § 40103. Sovereignty and use of airspace

(a) Sovereignty and public right of transit.—(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.

(b) Use of airspace.—(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for—

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * * *

49 U.S.C. § 47107. Project grant application approval conditioned on assurances about airport operations

(a) General written assurances.—The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—

* * * *

(9) appropriate action will be taken to ensure that terminal airspace required to protect instrument and visual operations to the airport (including operations at established minimum flight altitudes) will be cleared and protected by mitigating existing, and preventing future, airport hazards;

(10) appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations;

* * * *

APPENDIX D

FEDERAL REGULATION

14 C.F.R. § 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

APPENDIX E

LOCAL ORDINANCES

Bill No. 12-16-80-2

SUMMARY—An Ordinance adopting a new Chapter 29.50 to limit the height of objects around all public use airports within Clark County, Nevada, and repealing the existing Chapter 29.50.

ORDINANCE NO.—728
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29 OF THE CLARK COUNTY CODE BY ADDING THERETO A NEW CHAPTER DESIGNATED AS 29.50 WHICH REGULATES AND RESTRICTS THE HEIGHT OF STRUCTURES AND OTHERWISE REGULATES THE USE OF THE PROPERTY WITHIN THE JURISDICTION OF CLARK COUNTY, NEVADA AND IN THE VICINITY OF ALL PUBLIC USE AIRPORTS BY CREATING THE APPROPRIATE ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE MC CARRAN INTERNATIONAL AIRPORT AIRSPACE ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; REPEALING THE EXISTING CHAPTER 29.50 OF THE CLARK COUNTY CODE; PROVIDING FOR ENFORCEMENT AND PROVIDING OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Legislative Findings. It is hereby found that an obstruction has the potential for endangering the lives and

property of users of any public use Airport, and property or occupants of land within Clark County, Nevada, in the vicinity of these Airports; that an obstruction may affect existing and future instrument approach minimums of any public use Airport; that an obstruction may reduce the size of the areas available for the landing, takeoff, and maneuvering of aircraft, thus tending to destroy or impair the utility and capacity of these Airports and the public investment therein. Accordingly, it is declared:

(A) That the establishment of an obstruction has the potential of being a public nuisance and may injure the region served by McCarran International Airport or any other public use Airport;

(B) That it is necessary in the interest of the public health, public safety, and general welfare that the establishment of obstructions that are a hazard to air navigation be prevented; and

(C) That the prevention of these obstructions should be accomplished to the extent legally possible by the exercise of the police power without compensation.

SECTION 2. That the present Chapter 29.50 of the Clark County Code is hereby repealed in its entirety.

SECTION 3. That a new Chapter 29.50 be adopted as follows:

CHAPTER 29.50

PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS

Sections:

29.50.010 Definitions
29.50.020 Airport zones
29.50.030 Airport zone height limitations
29.50.040 Use restrictions
29.50.050 Nonconforming uses
29.50.060 Variances

29 .010 DEFINITIONS. As used in this Ordinance, unless the context otherwise requires;

1. PUBLIC USE AIRPORT—means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport, Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

2. AIRPORT ELEVATIONS—The highest point of an airport's usable landing area measured in feet above mean sea level.

3. APPROACH SURFACE—A surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as the approach zone height limitation slope set forth in Section 29.50.030 of this Ordinance. In plan the perimeter of the approach surface coincides with the perimeter of the approach zone.

4. APPROACH, TRANSITIONAL, HORIZONTAL, AND CONICAL ZONES—These zones are set forth in Section 29.50.020 of this Ordinance.

5. CONICAL SURFACE—A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(6) HAZARD TO AIR NAVIGATION—An obstruction determined to have a substantial adverse effect on the safe and efficient utilization of the navigable airspace.

(7) HEIGHT—For the purpose of determining the height limits in all zones set forth in this Ordinance and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

(8) HORIZONTAL SURFACE—A horizontal plane 150 feet above the established airport elevation, the perimeter of

which in plan coincides with the perimeter of the horizontal zone.

(9) LARGER THAN UTILITY RUNWAY—A runway that is constructed for and intended to be used by propeller driven aircraft of greater than 12,500 pounds maximum gross weight and jet power aircraft.

(10) NONCONFORMING USE—Any pre-existing structure or use of land which is inconsistent with the provisions of this Ordinance or an amendment thereto.

(11) NONPRECISION INSTRUMENT RUNWAY—A runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.

(12) OBSTRUCTION—Any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030 of this Ordinance.

(13) PERSON—An individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

(14) PRECISION INSTRUMENT RUNWAY—A runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on an approved airport layout plan.

(15) PRIMARY SURFACE—A surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway, when the runway has no specially prepared hard surface, or planned hard surface, the

primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.

(16) RUNWAY—a defined area on an airport prepared for landing and take-off of aircraft along its length.

(17) STRUCTURE—An object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

(18) TRANSITIONAL SURFACES—These surfaces extend outward at 90 degree angles to the runway centerline and the runway centerline extended at a slope of seven (7) feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at 90 degree angles to the extended runway centerline.

(19) TREE—Any object of natural growth

(20) UTILITY RUNWAY—A runway that is constructed for and intended to be used by propeller driven aircraft of 12,500 pounds maximum gross weight and less.

(21) VISUAL RUNWAY—A runway intended solely for the operation of aircraft using visual approach procedures.

29.50.020 AIRPORT ZONES. In order to carry out the provisions of this Ordinance, there are hereby created and established certain zones which include all of the airspace above the height of 35 feet above the surface of the land, lying beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces as they apply to the portions

of any public use Airport lying within the jurisdiction of Clark County, Nevada. Such zones for McCarran International Airport are shown on the McCarran International Airport Airspace Zoning Map consisting of three (3) sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979, a copy of which is on file at the County Clerk's office and which is hereby incorporated by reference and made a part hereof. An area located in more than one (1) of the following zones is considered to be only in the zone with the more restrictive height limitations. The various zones are hereby established and defined as follows:

(A) *Runway Approach Zones*

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L.

The inner edge of this approach zone coincides with the width of the primary surface and is 250 feet wide. The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones—Runways O1R, 07L, 07R.

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones—Runways 19L, 25R, 25L

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet

wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface 250 feet wide. The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 2,000 feet at a horizontal distance 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger Than Utility Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger Than Utility with A Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide.

The approach zone expands outward uniformly to a width of 3,500 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger Than Utility With A Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 4,000 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

f. Precision Instrument Runway Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(B) *Transition Zones*

Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one (1) foot vertically for each seven (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one (1) foot vertically for each

seven (7) feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) *Horizontal Zone*

The horizontal zone is the area beneath the horizontal surface and is established by swinging arcs of 5,000 feet radii for all runways designated utility or visual and 10,000 feet radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of 150 feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) *Conical Zone*

The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one (1) foot in height for every twenty (20) feet of horizontal distance outward therefore a distance of 4,000 feet. The conical zone does not include the instrument approach zones or transition zones.

29.50.030 AIRPORT ZONE HEIGHT LIMITATIONS

Except as otherwise provided in this Ordinance, no structure shall be erected, alerted, or maintained in any zone created by this Ordinance to a height in excess of the applicable height limit herein established for such zone. However, nothing in this Ordinance shall be construed as prohibiting

the construction or maintenance of any structure to a height up to 35 feet above the surface of the land in any zone created by this Ordinance. Further, no building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the Director of Aviation of Clark County shall have determined that the building or structure is so situated or marked that it would not be a hazard. All construction within the various height zones shall be subject to the property owners' signing an avigation easement. Such applicable height limitations are hereby established for each of the zones in question as follows:

(A) *Runway Approach Zones*

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01R, 07L, 07R

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones—Runway 19L, 25R, 25L.

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal dis-

tance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

(2) *All other Public Use Airports*

(a) Utility Runway Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(d) Runway Larger than Utility With a Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a

horizontal distance of 10,000 feet along the extended runway centerline.

(e) Runway Larger than Utility With a Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone.

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

(B) *Transition Zones*

Slope one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of 150 feet above the airport elevation. In addition to the foregoing, there are established height limits of one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one (1) foot for

each seven (7) feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of 5,000 feet measured at 90 degree angles to the extended runway centerline.

(C) *Horizontal Zone*

One hundred fifty (150) feet above the established Airport elevation.

(D) *Conical Zone*

One (1) foot vertical height for each twenty (20) feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of 4,000 feet to a height of 350 feet above the airport elevation.

29.50.040 USE RESTRICTIONS

Notwithstanding any other provisions of this Ordinance, no use may be made of land or water within any zone established by this Ordinance in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport.

29.50.050 NONCONFORMING USES

(A) Regulations Not Retroactive

The regulations prescribed by this Ordinance shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date of this Ordinance, or otherwise interfere with the continuance of a nonconforming

use. Nothing contained herein shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted.

(B) Marking and Lighting

Notwithstanding the preceding provisions of this Section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the Director of Aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction.

29.50.060 VARIANCES

(A) Future Uses

Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or other wise use his property in a manner which would constitute a violation of these regulations, may apply to the Clark County Planning Commission for a variance from these regulations. Such variances will be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code. Any such variance allowed may be subject to any reasonable conditions that the Clark County Planning Commission or Board of County Commissioners may deem necessary to effectuate the purposes of Chapter 29.66 of the Clark County Code, including, *but not limited to*, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be

necessary. If deemed proper by the Board of Clark County Commissioners, this condition may be modified to require the owner to permit Clark County, at its own expense, to install, operate, and maintain the necessary markings and lights.

(B) Existing Uses

No permit shall be granted that would allow the ~~establ~~-lishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this Ordinance or any amendments thereto or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed

Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than 50 percent (50%) torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 4: Enforcement and Penalties.

The penalties and enforcement provisions set forth in Chapter 29.74 of the Clark County Code shall govern the provisions of this Chapter.

SECTION 5: If any section of this Ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining portions of this Ordinance.

SECTION 6: All Ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 7: This Ordinance shall take effect and be in force from and after its passage and publication thereof by title only, together with the names of the County Commissioners voting for or against the passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED ON THE 16th DAY OF December, 1980

PROPOSED BY: Thalia Dondero

PASSED ON THE 20th DAY OF January, 1981

VOTE: AYES Robert N. Broadbent
David Canter
Manuel Cortez
Thalia Dondero
Jack R. Petitti
Richard J. Ronzone

NAYS None

ABSTAINING None

ABSENT Woodrow Wilson

BOARD OF COUNTY COMMISSIONERS
CLARK COUNTY, NEVADA

BY: /s/ Manuel Cortez
Chairman, MANUEL CORTEZ

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This Ordinance shall be in force and effect from and after the 3rd day of February, 1981.

APPROVED AS TO FORM:
ROBERT J. MILLER, DISTRICT ATTORNEY

By: /s/ Thomas R. Severns
Deputy, THOMAS R. SEVERNS

[Bracketed] material is that portion being deleted
Underlined material is that portion being added

BILL NO. 6-20-90-2

SUMMARY—An Ordinance to amend Chapter 29.50 to enlarge the area included within the regulations governing airport airspace zoning and height restrictions and to adopt new airport airspace zoning maps for McCarran International Airport, North Las Vegas Airport, Overton Airport and Jean Airport.

ORDINANCE NO. 1221
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29, CHAPTER 29.50. PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS BY ADOPTING SPECIFIC AIRSPACE ZONING MAPS FOR MCCARRAN INTERNATIONAL, NORTH LAS VEGAS, OVERTON AND THE JEAN AIRPORTS, TO PROVIDE THAT NOTICE MUST BE GIVEN TO THE FAA PRIOR TO CONSTRUCTION WITHIN THE PROVIDED HEIGHT STANDARDS, TO MODIFY THE LANGUAGE PROVIDING FOR VARIANCE PROCEDURES AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

29.50.010 Definitions. As used in this chapter, unless the context otherwise requires or the definition is inconsistent with a definition by the Federal Aviation Administration:

(1) "Public use airport" means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport,

Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

(2) "Airport elevations" mean the highest point of an airport's usable landing area measured in feet above mean sea level.

[(3) "Approach surface" means a surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as approach zone height limitation slope set forth in Section 29.50.030. In plan, the perimeter of the approach surface coincides with the perimeter of the approach zone.

(4) "Approach, transitional, horizontal, and conical zones" are as set forth in Section 29.50.020.

(5) "Conical Surface" means a surface extending outward and upward from the periphery of the horizontal surface at a slope of 20:1 for a horizontal distance of four thousand feet.]

[(6)] (3) "Hazard to air navigation" means an obstruction determined to have a substantial adverse effect on the safe and efficient utilization of navigable airspace.

[(7)] (4) "Height." For the purpose of determining the height limits in all zones set forth in this chaper [sic] and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

[(8) "Horizontal surface" means a horizontal plane one hundred fifty feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zone.

(9) "Larger than utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of greater than twelve thousand five hundred pounds maximum gross weight and jet power aircraft.]

[(10)] (5) "Nonconforming use" means any pre-existing structure or use of land which is inconsistent with the provisions of this chapter or an amendment thereto.

[(11) "Nonprecision instrument runway" means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.]

[(12)] (6) "Obstruction" means any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030.

[(13)] (7) "Person" means an individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

[(14) "Precision instrument runway" means a runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on the Official Airport Airspace Zoning Maps.

(15) "Primary surface" means a surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each and of that runway, when the runway has no specially prepared hard surface or planned hard surface, the primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.]

[(16)] (8) "Runway" means a defined area on an airport prepared for landing and takeoff of aircraft along its length.

(9) "Runway Protection Zone" (formerly "Runway Clear Zone") means a trapezoidal area at ground level, for the purpose of protecting the safety of approaches and keeping the area clear of the congregation of people.

[(18)] (10) "Structure" means an object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

[(19) "Transitional surfaces" mean surfaces which extend outward at ninety degree angles to the runway centerline, and the runway centerline extended at a slope of seven feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of five thousand feet measured horizontally from the edge of the approach surface and at ninety degree angles to the extended runway centerline.]

[(20)] (11) "Tree" means any object of natural growth.

[(21) "Utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of twelve thousand five hundred pounds maximum gross weight and less.

(22) "Visual runway" means a runway intended solely for the operation of aircraft using visual approach procedures. (Ord. 728 & 3 (part), 1981)]

29.50.020 Airport zones. In order to carry out the provisions of this chapter, there are created and established certain zones which include all of the airspace above the height of thirty-five feet above the surface of the land, lying

beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces, as they apply to the portions of any public use airport lying within the jurisdiction of Clark County, Nevada. Such zones for [McCarran International Airport] each public use airport are shown on the [McCarran International] Official Airport Airspace Zoning Map [consisting of three sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979,] for each public use airport as adopted by specific map as put forth in §29.50.050. [a copy of which is on file at the county clerk's office and which is hereby incorporated by reference and made a part hereof.] An area located in more than one of the [following] airport zones is considered to be only in the zone with the more restrictve height limitations.

[(A) Runway Approach Zones.

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone Runways 19R, 01L. The inner edge of this approach zone coincides with the width of the primary surface and is two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01L, 07L, 07R. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones Runways 19L, 25R, 25L. The inner edge of this approach zone coincides with the width of the primary surface and is

one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of two thousand feet at a horizontal distance five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger than Utility Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger than Utility with a Visibility minimum Greater than Three-fourths Mile Nonprecision Instrument approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of three thousand five hundred feet at a horizontal distance of ten thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger than Utility with a Visibility Minimum as Low as Three-fourths Mile Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of four thousand feet at a horizontal distance of ten thousand from the primary surface. Its centerline is the continuation of the centerline of the runway.

(f) Precision Instrument Runway Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. It centerline is the continuation of the centerline of the runway.

(B) Transition Zones. Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one foot vertically for each seven feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symmetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one foot vertically for each seven feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of five thousand feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) Horizontal Zone. The horizontal zone is the area beneath the horizontal surface and is established by swinging

arcs of five thousand feet radii for all runways designated utility or visual and ten thousand feed [sic] radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of one hundred fifty feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) Conical Zone. The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one foot in height for every twenty feet of horizontal distance outward therefore for a distance of four thousand feet to a height of three hundred and fifty (350) feet above the airport elevation. The conical zone does not include the instrument approach zones or transition zones. (Ord. 728 & 3 (part), 1980)]

29.50.030 Airport zone height limitations. (A) Except as otherwise provided in this chapter, no structure shall be erected, [alerted] altered, or maintained in any airport zone [created by this chapter to a height] that would violate the height limitations depicted in the maps adopted herewith [in excess of the applicable height limit established in this chapter for such zones]. However, nothing in this chapter shall be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone created by this chapter. [Further, no Building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the director of aviation of the county shall have determined that the building or structure is so situated or marked that it would not be a hazard] Any building or structure constructed within the zones shall be situated or marked as approved by the Federal Aviation Administration and the Clark County Department of Aviation so that it does not constitute a hazard as defined

in Section 29.50.010(3). All construction within the various height zones shall be subject to the property owner's signing an avigation easement. [Such applicable height limitations are established for each of the zones in question as follows:

(A) Runway Approach Zones.

(1) McCarran International Airport.

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01R, 07L, 07R. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones Runway 19L, 25R, 25L. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forty thousand feet along the extended runway centerline.

(2) All Other Public Use Airports.

(a) Utility Runway visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument approach Zone. Slopes twenty feet outward for each foot

upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(d) Runway Larger than Utility with a visibility Minimum Greater than Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(e) Runway Larger than Utility with a Visibility Minimum As Low as Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forth [sic] thousand feet along the extended runway centerline.

(B) Transition Zones. Slopes one foot vertically for each seven feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of one hundred fifty feet above the airport elevation. In addition to the foregoing, there are extablished [sic] height limits of one foot vertically for each

seven feet horizontally beginning a [sic] the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one foot for each seven feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of five thousand feet measured at ninety degree angles to the extended runway centerline.

(C) Horizontal Zone. One hundred fifty feet above the established airport elevation.

(D) Conical Zone. One foot vertical height for each twenty feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of four thousand feet to a height of three hundred fifty feet above the airport elevation. (Ord. 728 &3 (part), 1980)]

29.50.040 Notices of Construction or Alteration.

(A) Any person proposing construction or alteration in the environs of any public use airport or airport operated by the United States Armed Services shall notify the Chief, Air Traffic Division, FAA Regional Office having jurisdiction over the area within which the construction or alteration will be located not less than thirty days before the commencement of the construction or alteration if such construction or alteration exceeds any of the following height standards:

(1) Two hundred (200) feet above the ground level at its site.

(2) The plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of any airport subject to the provisions of this chapter.

(3) For highways, railroads and other traverse ways for mobile objects; if construction or alteration is of greater height than the standards set forth in subparagraphs (1) or (2) hereinbefore after their height has been adjusted upward for the appropriate traverse way as follows:

(a) For interstate highways: 17 feet

(b) For any other public roadways: 15 feet

(c) For any private road: 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater.

(d) For any railroad: 23 feet

(e) For a waterway or any otherunspecified .[sic] traverse way: the height of the highest mobile object that would normally use the traverse way.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area and available information indicates the height might exceed any FAA obstruction standard.

Any notice required by this section shall be on FAA Form 7460-1, available from the regional offices of the Federal Aviation Administration.

(B) Construction or Alteration not requiring notice. Notice to the FAA is not required for construction or alteration of any of the following:

(1) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographical features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.

(2) Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.

(3) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

(4) Any construction or alteration for which notice is required by any other FAA regulation.

29.50.050 Official Airport Airspace Zoning Maps. The following official airport airspace zoning maps for specific public use airports lying within the jurisdiction of Clark County, Nevada, as adopted by ordinance of The Board of Clark County Commissioners, are on file at the office of the County Clerk and hereby incorporated by reference and made a part hereof:

(A) The McCarran International Airport Official Airspace Zoning Map, consisting of five (5) sheets,prepared [sic] by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(B) The North Las Vegas Air Terminal Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(C) The Overton Airport Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(D) The Jean Airport Official Airspace Zoning Map consisting of one (1) sheet, prepared by the Clark

County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

29.50.060 Use restrictions. Notwithstanding any other provisions of this chapter, no use may be made of land or water within any zone established by this chapter in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport. (Ord. 728 & 3 (part), 1980)

29.50.070 Nonconforming uses. (A) Regulations Not Retroactive. The regulations prescribed by this chapter shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date of this chapter, or otherwise interfere with the continuance of a nonconforming use. Nothing contained in this chapter shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this chapter, and is diligently prosecuted.

(B) Marking and Lighting. Notwithstanding the preceding provisions of this section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the director of aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction. (Ord. 728 & 3 (part), 1980)

29.50.080 Variances. (A) Future Uses. Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use his property in a manner which would constitute a violation of these regu-

lations, may apply to the county planning commission for a variance from these regulations. Such variances [will] may be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations [and of Chapter 29.66]. Any such variance allowed may be subject to any reasonable conditions that the county planning commission or board of county commissioners may deem necessary to effectuate the purposes of [Chapter 29.66,] Title 29 including, but not limited to, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the board of county commissioners, this condition may be modified to require the owner to permit the county, at its own expense, to install, operate, and maintain the necessary markings and lights. Variances pursuant to this chapter shall be considered under the procedures put forth under Section 29.66 of this title with the exception that the applicant shall notify the FAA Regional Office of the application prior to the time of submission of the variance application and that the Planning Commissions' action concerning the variance application shall be considered advisory only, with all variances being referred to the Board of County Commissioners for final disposition.

(B) Existing Uses. No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this chapter or any amendments thereto, or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed. Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than fifty per-

cent torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 2. If any section of this ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining parts of this ordinance.

SECTION 3. All ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 4. This ordinance shall take effect and be in force from and after its passage and the publication thereof by title only, together with the names of the County Commissioners voting for or against its passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED on the 20th day of June, 1990.

PROPOSED BY Manuel J. Cortez &
William U. Pearson

PASSED on the 18th day of July, 1990.

VOTE:

AYES: Jay Bingham
Paul J. Christensen
Manuel J. Cortez
Thalia M. Dondero
Karen Hayes

NAYS: None

ABSTAINING: None

ABSENT: William U. Pearson
Bruce L. Woodbury

BOARD OF COUNTY
COMMISSIONERS
CLARK COUNTY, NEVADA

By /s/ Bruce L. Woodbury
Chairman

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This ordinance shall be in force and effect from and after the 1st day of August, 1990.

June 22, 1994

Bill No. 6-7-94-3(A)

Summary An Ordinance Amending Title 20 of the Clark County Code by Creating Chapter 20.13 Concerning Airport Hazard Regulations and Providing for Other Matters Properly Relating Thereto

Ordinance No. 1599

AN ORDINANCE TO AMEND TITLE 20 OF THE CLARK COUNTY CODE BY CREATING CHAPTER 20.13 TO ESTABLISH AIRPORT HAZARD AREAS FOR MCCARRAN INTERNATIONAL AIRPORT AND THE NORTH LAS VEGAS AIR TERMINAL, AND WITHIN SUCH AIRPORT HAZARD AREAS PROHIBITING THOSE LAND USES WHICH COULD CAUSE A HAZARD TO AIR TRAFFIC, AND REGULATING AND RESTRICTING THE HEIGHT TO WHICH STRUCTURES AND TREES MAY BE ERECTED OR ALLOWED TO GROW; PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Title 20 of the Clark County Code is amended by adoption of a new Chapter 13 to read as follows:

20.13.010 Purpose and Intent. These Airport Hazard regulations are adopted pursuant to Chapter 497 of the Nevada Revised Statutes, which authorizes every political subdivision having an airport hazard area within its territorial limits to adopt, administer and enforce, under the police power, airport zoning regulations for such airport hazard area. In connection therewith, the Board finds:

(1) That the creation or establishment of airport hazards is a public nuisance and an injury to the communities served

by the McCarran International Airport and the North Las Vegas Air Terminal (together, the "Airports");

(2) That, in the interest of the public health, public safety and general welfare, creation or establishment of airport hazards affecting the operation of the Airports should be reduced or eliminated;

(3) That airport hazards can be reduced or eliminated by establishing airport hazard areas for the Airports and, within such airport hazard areas, establishing regular zones of approach and areas of landing for the Airports and by regulating and restricting the height to which structures and trees may be erected and by prohibiting those land uses which could cause a hazard to air traffic;

(4) That airport hazard areas should be established for the Airports, that within such airport hazard areas, certain land uses which could cause a hazard to air traffic should be prohibited, and that the height of structures and trees should be regulated and restricted.

(5) That the Board of County Commissioners in adopting these regulations intends to exercise the full extent of its authority under Chapter 497 in creating a uniform, comprehensive method for regulation of land uses to preserve the benefits of air transportation.

20.13.020 Definitions. As used in this chapter, unless the context otherwise requires:

(1) "Airports" means the McCarran International Airport and the North Las Vegas Air Terminal, located in Clark County, Nevada.

(2) "Airport hazard" means any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking off at the Airport, or is otherwise hazardous to the landing or taking off of aircraft.

(3) "Airport hazard area" means any area of land or water upon which an airport hazard might be established if not prevented, as established under section 20.13.030.

(4) "Airspace Zoning Maps" means (1) the McCarran International Airport Airspace Zoning Map, consisting of five sheets prepared by the Clark County Airport Engineering Department, dated July 18, 1990, and adopted by Ordinance 1221, together with the McCarran International Airport Aircraft Departure Critical Area Map, consisting of one sheet prepared by the Clark County Airport Engineering Department, dated February 2, 1993, and adopted with this ordinance, and (2) the North Las Vegas Air Terminal Airspace Zoning Map, consisting of one sheet prepared by the Clark County Airport Engineering Department, dated July 18, 1990, and adopted by Ordinance 1221.

(5) "Board" means the Board of Adjustment to the created pursuant to these regulations.

(6) "Director of Aviation" means the Director of the Clark County Department of Aviation.

(7) "Height." For the purpose of determining the height limits in all zones set forth in this chapter and/or shown on the Airspace Zoning Maps, the datum shall be mean sea level elevation.

(8) "Nonconforming use" means any preexisting structure or use which is inconsistent with the provisions of this chapter or an amendment thereto, or any proposed structure or use which is inconsistent with the provisions of this chapter or an amendment thereto, provided that construction of such structure or commencement of such use was begun prior to the effective date of this chapter (a) after obtaining all requisite governmental approvals and authorizations and the passage of time limits prescribed for appeal or challenge to such approvals and authorizations without any such appeal or challenge having been taken; and (b) in good faith reliance on

a final, valid building permit permitting the specific construction and provided further that, pursuant to such permit, substantial sums, not including costs for engineering, architectural, legal or other such services, investigations, designs or studies, have been expended for actual on-site construction.

(9) "Person" means an individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

(10) "Runway" means the areas on either Airport prepared for landing and takeoff of aircraft along its length.

(11) "Structure" means an object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

(12) "Tree" means any object of natural growth.

20.13.030 Airport Hazard Area. There are hereby established Airport Hazard Areas for the Airports which include all of the land located within Clark County that lies beneath the approach zones, transitional zones, horizontal zones, and conical zones of the Airports, as shown on the Airspace Zoning Maps, which land shall include any land within the territorial limits of the County, including, without limitation, any such land that is located within an incorporated municipality or special district.

20.13.040 Airport Hazard Area Height Limitations. Except as otherwise provided in this chapter, no structure shall be erected, altered, or maintained in the Airport Hazard Areas that would violate the height limitations depicted on the Airspace Zoning Maps or would otherwise constitute an airport hazard. All construction within the Airport Hazard Areas shall be subject to the execution by the property owner of an

avigation easement in a form prescribed by the Director of Aviation.

20.13.050 Notices of Construction or Alteration.

(A) Construction or Alteration Requiring Notice. Prior to commencing construction or alteration of any structure within either of the Airport Hazard Areas, any person proposing such construction or alteration shall notify the Director of Aviation and the Chief, Air Traffic Division, Federal Aviation Administration ("FAA") Regional Office having jurisdiction over the area within which the construction or alteration will be located if such construction or alteration exceeds any of the following height standards:

(1) Two hundred feet above the ground level at its site;

(2) The plane of an imaginary surface extending outward and upward at a slope of one hundred to one for a horizontal distance of twenty thousand feet from the nearest point of the nearest runway of either of the Airports;

(3) For highways, railroads and other traverse ways for mobile objects; if construction or alteration is of greater height than the standards sec forth in subdivisions (1) or (2) of this subsection after their height has been adjusted upward for the appropriate traverse way as follows:

(a) For interstate highways: seventeen feet,

(b) For any other public roadways: fifteen feet,

(c) For any private road: ten feet or the height of the highest mobile object that would normally traverse the road, whichever is greater,

(d) For any railroad: twenty-three feet,

(e) For a waterway or any other unspecified traverse way: the height of the highest mobile object that would normally use the traverse way;

(4) Any other structure for which notice is required to be given to the FAA pursuant to current or future laws and regulations, including any such notice requested by the FAA for any construction or alteration that would be in an instrument approach area and available information indicates the height might exceed any FAA obstruction standard.

Any notice required by this section shall be on FAA Form 7460-1, available from the regional offices of the FAA.

(B) Construction or Alteration Not Requiring Notice. Notice to the FAA is not required for construction or alteration of any of the following:

(1) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographical features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.

(2) Any antenna structure of twenty feet or less in height, except one that would increase the height of another antenna structure.

(3) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator of the FAA, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

20.13.060 Permit Required.

(A) A permit from the Director of Aviation shall be required before any of the following:

(1) any new structure or use which is required to give notice under section 20.13.050(A) may be constructed or established.

(2) any existing structure or use which is required to give notice under section 20.13.050(A) may be substantially changed or substantially altered,

(3) any nonconforming structure or tree may be replaced, substantially altered, rebuilt, allowed to grow higher, or replanted.

No such permit shall be required to make maintenance repairs to any existing structure, or to replace parts of any existing structure, which repairs or replacements do not substantially enlarge or increase the height of an existing structure.

(B) The applicant for such permit shall apply to the Director of Aviation, on forms prescribed by the Director of Aviation, and together therewith, provide the following information:

(1) If notice is required under section 20.13.050(A) above, a copy of (a) the notice to the FAA, (b) the acknowledgement thereof issued by the FAA pursuant to Part 77 of Title 14 of the FAA Regulations ("Part 77"), and (c) any further aeronautical study of the proposed construction or alteration conducted by the FAA pursuant to Part 77;

(2) A copy of the schematic plans for the contemplated structure or use, which plans shall demonstrate the height and configuration of the structure or use;

(3) Such other studies and background information as the Director of Aviation may reasonably require.

(C) The Director of Aviation shall review the permit application and shall deny a permit if:

(1) the granting of the permit would allow the establishment or creation of an airport hazard; or

(2) the granting of the permit would permit a nonconforming structure or tree or nonconforming use to be made or

become higher or become a greater hazard to air navigation than it was when these regulations were adopted or than it is when the application for a permit is made.

In determining whether any structure or tree or use constitutes an airport hazard, the Director of Aviation shall consider, among other evidence, whether any such structure or tree or use has been determined by the FAA to be a Hazard to Air Navigation, pursuant to Part 77.

(D) The Director of Aviation shall have 30 days after receipt of an application for a permit to advise the applicant whether or not additional information is required. If the Director advises the applicant that no additional information is required, the Director of Aviation shall have 30 additional days to grant or deny the permit. If additional information is required, the Director of Aviation shall have 30 additional days after receipt of all necessary specified information to grant or deny the permit. Failure to grant or deny the permit within such specified time periods shall be deemed to constitute a grant of such permit.

20.13.070 Nonconforming uses.

The regulations prescribed by this chapter shall not be construed to require the removal, lowering, or other change or alteration of any structure or tree not conforming to these regulations when they were adopted or amended, or otherwise interfere with the continuance of a nonconforming use, provided such prior non-conforming structure or use meets all the requirements of section 20.13.020(8), except as provided in section 20.13.090.

20.13.080 Variances.

Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use his property in a manner which would constitute a violation of these regulations, may apply to the Board for a variance

from these regulations. Such variances shall be allowed only where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations. As used herein, practical difficulty or unnecessary hardship shall be found only in cases where such difficulty and hardship is extreme and inequitable. Further, and without limitation, any relief granted would be contrary to the public interest if it interferes with the operations of either of the Airports. Any such variance allowed may be subject to any reasonable conditions that the Board may deem necessary to effectuate the purposes of these regulations.

20.13.090 Installation and Maintenance of Markers or Lights On Structures or Trees; Penalty.

In granting any permit or variance under sections 20.13.060 or 20.13.080, the Director of Aviation or Board may, if it deems such an action advisable to carry out the purposes of this chapter and reasonable in the circumstances, so condition the permit or variance as to require the owner of the structure or tree in question to permit the County to install, operate, and maintain thereon, at the owner's expense, such markers and lights as may be necessary to indicate to aviators the presence of a hazard to flight. The County may, with the permission of the owner and at its own expense, install and operate, upon nonconforming structures existing at the time these regulations are adopted, such markers or lights as may be necessary. After initial installation, the County may, upon written notice to the owner, require him to maintain those markers or lights in conformance with the standards of the FAA. Any person who fails to install, operate or maintain a marker or light or pay the expenses required in this section is guilty of a misdemeanor.

20.13.100 Board of Adjustment.

(A) There is hereby established a Board of Adjustment which shall have and exercise the following powers:

(1) To hear and decide appeals from any order, requirement, decision or determination made by the Director of Aviation in the enforcement of these regulations as provided in section 20.13.110.

(2) To hear and decide specific variances under section 20.13.080.

(B) The Board shall consist of five members, each to be appointed for a term of three years by the Board of County Commissioners, and shall be removable by the Board of County Commissioners for cause, upon written charges and after public hearing. None of them shall be members of the Board of County Commissioners or the Director of Aviation.

(C) The concurring vote of a majority of the members of the Board shall be sufficient to reverse any order, requirement, decision or determination of the Director, or to issue a variance as provided by section 20.13.080.

(D) The Board shall adopt rules and procedures in accordance with these regulations for the purposes of carrying out its responsibilities under these regulations, including fixing the time and manner for appeals, applications for variances and the proceedings before the Board, consistent with this section 20.13.

(E) Meetings of the Board shall be held at the call of the chairman and at such other times as the Board may determine.

(F) The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses.

(G) All hearings of the Board shall be public.

(II) The Board shall:

(1) Keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact.

(2) Keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the Board and shall be a public record.

20.13.110 Appeals.

(A) Any person aggrieved by any decision of the Director of Aviation made in its administration of these regulations, or the Board of County Commissioners, if it is of the opinion that a decision of the Director is an improper application of these regulations, may appeal to the Board.

(B) All appeals taken hereunder must be taken within a reasonable time, as provided by the rules of the Board, by filing with the Director and with the Board a notice of appeal specifying the grounds thereof. The Director shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

(C) An appeal shall stay all proceedings in furtherance of the action appealed from, unless the agency from which the appeal is taken certifies to the Board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in its opinion, cause imminent peril to life or property. In such cases proceedings shall not be stayed otherwise than by order of the Board on notice to the agency from which the appeal is taken and on due cause shown.

(D) The Board shall, by rules of the Board, fix a reasonable time for the hearing of appeals, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(E) The Board may, in conformity with the provisions of this chapter, reverse, affirm, wholly or partly, or modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the Director.

SECTION 2. In any case in which these airport hazard regulations, although generally reasonable, are held by a court to interfere with the use or enjoyment of a particular structure or parcel of land to such an extent, or to be so onerous in their application to such a structure or parcel of land, as to constitute a taking or deprivation of that property in violation of the constitution of this state or the Constitution of the United States, such holding shall not affect the application of such regulations to other structures and parcels of land.

SECTION 3. In the event any provision of these regulations is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of these regulations shall continue in full force and effect.

PROPOSED on the 7th day of June, 1994

PROPOSED by Karen Hayes

PASSED ON the 22nd day of June, 1994

VOTE:

AYES: Jay Bingham
Paul J. Christensen
Thalia M. Dondero
Yvonne Atkinson Gates
Karen Hayes
Don Schlesinger
Bruce L. Woodbury

NAYS: None

ABSTAINING: None

ABSENT: None

BOARD OF COUNTY
COMMISSIONERS
CLARK COUNTY, NEVADA

By: /s/ [Illegible]
Chairman

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This ordinance shall be in full force and effect from and after the 6th day of July, 1994.

3

No. 06-658

Supreme Court, U.S.
FILED
JAN 12 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MCCARRAN INTERNATIONAL AIRPORT
and CLARK COUNTY, a Political
Subdivision of the State of Nevada,

Petitioners,

v.

STEVE SISOLAK,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF IN OPPOSITION

LAURA WIGHTMAN FITZSIMMONS*
3216 West Charleston
Suite A
Las Vegas, Nevada 89102
(702) 382-5333

Counsel for Respondent

**Counsel of Record*

QUESTIONS PRESENTED

Respondent Steve Sisolak purchased ten acres of land within one mile of petitioner McCarran International Airport. Pursuant to petitioners' subsequent decision to designate the airspace immediately above respondent's land a runway approach area and a critical departure zone for the takeoff and landing of commercial aircraft from expanded runways, petitioner Clark County enacted two ordinances severely restricting the allowable heights of buildings on respondent's property. The state supreme court ruled that the ordinances violate the state Constitution by taking private property rights that state law confers on the owner of land in the usable airspace immediately above the land.

The questions presented are:

1. Whether this Court has jurisdiction to review the question whether the county ordinances amount to an unconstitutional taking under the federal Constitution when the state supreme court separately held that the ordinances violate the state Constitution based on the state supreme court's ruling that the state Constitution is more protective of property rights than the federal Constitution and the state court's interpretation of state law conferring on a landowner proprietary rights in the usable airspace immediately above the surface.

2. Whether 49 U.S.C. § 40102(a)(32), by authorizing the Federal Aviation Administration (FAA) to define "navigable airspace," including "airspace needed to ensure safety in the takeoff and landing of aircraft,"and related regulations promulgated by the FAA, preclude a state from conferring as a matter of state law proprietary rights protected by its state constitution in the usable airspace immediately above privately-owned land.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

ARGUMENT 8

I. This Court Lacks Jurisdiction to Consider Petitioners' Proffered Federal Constitutional Taking Issue Because the State Court Rested Its Judgment on Adequate and Independent State Law Grounds 10

II. Neither the Nevada Supreme Court's Allowance of an Attorney's Fee Award Nor Its Rejection of Petitioners' Federal Preemption Claim Resurrects this Court's Jurisdiction to Consider the Federal Taking Issue 15

III. Review is Not Warranted of Petitioners' Conten-tion that Federal Law Preempts the Nevada Supreme Court's Recognition as a Matter of State Law of Respondent's Property Rights in the Usable Airspace Immediately Above His Land and Their Protection by the Nevada Constitution 20

IV. Petitioners Mischaracterize the Nevada Supreme Court's Ruling and Exaggerate Its Importance 26

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Air Pegasus of D.C., Inc. v. *U.S.*, 424 F.3d 1206 (Fed. Cir. 2005) 24, 25
Argier v. *Nevada*, 114 Nev. 137, 952 P.2d 1390 (1998) 5
City of Austin v. *Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002) 25
Coleman v. *Thompson*, 501 U.S. 722, 729 (1991) 10
Dolan v. City of Tigard, 512 U.S. 374 (1994) 9, 12
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935) 10
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 5, 22
Hageman v. *Board of Trustees*, 20 Ohio App. 2d 12, 251 N.E. 2d 507 (Ohio Ct. App. 1969) 28
Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) ..... *passim*
Jankovich v. *Indiana Toll Road Comm'n*, 244 Ind. 574, 193 N.E. 2d 237 (1963) 14
Klinger v. *Missouri*, 13 Wall. (80 U.S.) 257 (1872) 10
Lambrix v. *Singletary*, 520 U.S. 518 (1997) 10
Lee v. *Kemna*, 534 U.S. 362 (2002) 10
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ..... *passim*
McShane v. *Faribault*, 292 N.W.2d 253 (Minn. 1980) 28
Michigan v. *Long*, 463 U.S. 1032 (1983) 10

Cases (continued):

Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) 9, 12
Palm Beach Isles Associates v. *U.S.*, 208 F.3d 1374 (2000), *overruled on other grounds, Bass Enters. Prod. Co.* v. *U.S.*, 381 F.3d 1360 (Fed. Cir. 2004) 24, 25
Penn Central Transportation Co. v. *City of New York*, 438 U.S. 104 (1978) ..... *passim*
Roark v. *City of Caldwell*, 87 Idaho 557, 394 P. 2d 641 (1964) 28
S.O.C., Inc. v. *The Mirage Casino-Hotel*, 117 Nev. 403, 23 P.3d 243 (2001) 11
United States v. *Causby*, 328 U.S. 256 (1946) 9, 18, 25

Constitutions, Statutes and Regulations:

Nevada Constitution ..... *passim*
Art. I, § 1 7
Art. I, § 8(6) 7
U.S. Constitution ..... *passim*
Airport and Airway Improvement Act of 1982, Pub L. 97-248, 96 Stat. 324, 671 (1982) 23
Section 511(a)(4), 96 Stat. 687 23
Section 511 (a)(5), 96 Stat. 688 23
Section 513(a)(2), 96 Stat. 689 22
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 ..... 8, 16, 17
49 U.S.C. § 40102(a)(32) 9, 20
72 Stat. 739, 49 U.S.C. § 1301(24) 22
14 C.F.R. § 60.17 (1965) 22
14 C.F.R. § 91.119 20
14 C.F.R. § 151.9(c) 23
14 C.F.R. § 151.11(a)-(d) 23
14 C.F.R. § 151.11(f) 23
Nev. Rev. Stat. § 342.105(1) 8, 16, 17

Constitutions, Statutes and Regulations (continued):

Nev. Rev. Stat. § 37.010(14) 5, 19
Nev. Rev. Stat. § 493.030 ..... 5, 19
Nev. Rev. Stat. § 493.040 ..... 5, 19
Nev. Rev. Stat. § 404.050(1)(a) 5, 19
Clark County Ordinance No. 1221 ..... *passim*
Clark County Ordinance No. 1599 ..... *passim*
Clark County, Nev. Code § 30.08.030 (2005) 11

Miscellaneous:

Advisory Circular 150/5190-4A "A Model Zoning Ordinance to Limit Heights of Objects Around Airports" (12/14/87) 24
Brief for Petitioner, in *Jankovich* v. *Indiana Toll Road Comm'n* 21, 28
Clark County Dept. of Aviation, Comprehensive Annual Financial Report (2005) 27-28
FAA Discussion Paper on Zoning for Airports (9/8/87) 24
FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, I-2 (2005) 24
Memorandum of U.S. as Amicus Curiae, *Jankovich* v. *Indiana Toll Road Comm'n.* 10, 21
http://cms.mccarran.com/dsweb/Get/Document-27400/1996-2001%20Landings%20by%20Airlines.pdf 27
http://cms.mccarran.com/dsweb/Get/Document-1510/Total%20Landings%20by by20%Airline%20July%20-%20December%202006.pdf 27

IN THE
Supreme Court of the United States

No. 06-658

MCCARRAN INTERNATIONAL AIRPORT AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA
Petitioners,

v.

STEVE SISOLAK,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

---

BRIEF IN OPPOSITION

JURISDICTION

Jurisdiction is lacking under 28 U.S.C. § 1257(a) to consider petitioners' federal takings claim because the judgment of the Nevada Supreme Court rests on an adequate and independent state law ground.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the laws set forth in the petition, this case involves the meaning of the Nevada Constitution, Art. 1,

§§ 1, 8(6), and Nev. Rev. Stat. §§ 37.010(14), 342.105, 493.030, 493.040, 493.050(1)(a), all of which are reproduced at App., *infra*, at 1a-3a.

STATEMENT

1. During the 1980s, respondent Steve Sisolak purchased three adjacent parcels totaling approximately ten acres of land in the vicinity of petitioner McCarran International Airport, which is operated by petitioner Clark County in the State of Nevada.[1] At the time of purchase, respondent's property was zoned for commercial development as a hotel, casino, or apartment building. Although a county ordinance existing at that time placed respondent's property within the airport's "horizontal zone," respondent would have been allowed under that ordinance to construct buildings on the land at least 170 feet in height. Pet. App. 2a-3a, 10a-11a, 62a-77a; Trial Transcript 227-28 (Friday, Feb. 28, 2003).

During the 1990s, petitioners enacted two new ordinances in order to provide for an expansion and upgrade of existing runways at the airport necessary for increased flights by larger commercial aircraft. In 1990, the first new ordinance, Ordinance No. 1221, placed respondent's property in the "precision instrument runway approach zone," which imposed a 50:1 slope restriction, allowing only one foot of building above the airport's ground level for every 50 feet of distance from the end of the runway. As applied to respondent's property, which is higher in elevation than the airport, this new restriction resulted in a presumptive height limitation of 41 to 51 feet. In 1994, the second new ordinance, Ordinance No. 1599, placed respondent's property in the "departure critical area," which further increased the slope restriction to an 80:1 slope, resulting in presumptive

[1] Petitioners McCarran International Airport and Clark County, Nevada, are referred to jointly simply as "petitioners" for the purpose of this brief.

"height restrictions of 3 to 10 feet above ground level." Pet. App. 3a-4a, 78a-94a, 95a-106a.[2]

2. Respondent filed a complaint in state trial court alleging that the severe height limitations imposed by petitioners' newly-enacted ordinances amounted to an unconstitutional taking of private property under both the federal and Nevada constitutions. Respondent based his claim for just compensation on the central contention that the ordinances permitted a permanent physical invasion of usable airspace immediately above the surface of his land by the regular landing and take-off of commercial aircraft from the airport. Pet. App. 6a; NSC Rec. 1.[3]

Focusing on whether the usable airspace immediately above respondent's land had been selected by petitioners as the "actual appropriated flight pattern pathway for landings and takeoff," the district court initially denied respondent's motion for summary judgment. NSC Rec. 1477-78. The court concluded that there appeared to be genuine issues of fact concerning "whether or not Plaintiff has been injured in fact by a public use." *Id.* The court explained that further inquiry "regarding the nature of the flights over [respondent's] property" was necessary because "it is not clear that the County does not dispute Plaintiff's statement of the facts regarding the actual air traffic appropriation." *Id.*; Pet. App. 7a-8a.

Following respondent's submission of additional uncontradicted evidence establishing the nature and extent of airplane overflights permitted by petitioners' two

---

[2] The height restrictions imposed by both ordinances are subject to variances and in March 2001 petitioners granted respondent a variance, denying his request to build to 70 feet, but allowing a development with a building as high as 66 feet. That variance lapsed after a passage of one year in the absence of development by respondent. Pet. App. 6a; see *id.* at 91a-92a, 102a-103a.

[3] "NSC Rec." refers to the record filed with the Nevada Supreme Court.

new ordinances, the trial court granted summary judgment in respondent's favor. Respondent's additional evidence included an official map depicting flight tracks over respondent's property, a deposition by an airport employee admitting that aircraft flew below 500 feet over respondent's land, and petitioners' formal acknowledgment in response to an interrogatory that flights were occurring over respondent's land below 500 feet. Pet. App. 7a-8a. Respondent's evidence before the court also included a video showing the takeoff and landing of aircraft over his land, which respondent asserted amounted to 100 planes per day below 500 feet; even petitioners' counsel admitted during trial that "[o]ne of these nice large airplanes, whether it be a 737 or larger that is landing, can appear like it is going to drop on your head and still be three or 400 feet above the ground." *Id.*; NSC Rec. 1586.

The jury awarded respondent $6.5 million in just compensation for the taking of an easement through the usable airspace immediately above respondent's land, and the trial court added prejudgment interest, costs, and attorney's fees. The jury based its award on the jury instruction that it should determine just compensation by comparing the difference between the value of the property before and after the new, more severe height restrictions imposed by Ordinances 1221 and 1599. The evidence before the jury established that the "property's best use in the 'before condition' would be a hotel or timeshare with a height of approximately 110-180 feet," based on petitioners' concession that respondent could have obtained a variance to build to at least 170 feet; and the judge expressly instructed the jury, in determining the "after" value, to assume that petitioners would grant respondent a variance to construct as high as 66 feet. Pet. App. 10a-11a; NSC Rec. 3992-93 (jury instructions); Trial Transcript 227-28 (Friday, Feb. 28, 2003).

As a result, the jury award of just compensation was

based on the value of a navigation easement in the airspace as necessary for the takeoff and landing of aircraft traveling between 66 feet and 110-180 feet above respondent's land, or approximately 104 feet of airspace. Because respondent did not dispute that he would likely be able to obtain a variance from petitioners allowing a building as tall as 66 feet, respondent neither sought nor obtained a just compensation award based on the presumptive height restrictions applicable to his land, which allow no building greater than 3 to 10 feet above ground. Pet. App. 10a-11a.

3. The Nevada Supreme Court affirmed. Pet. App. 1a-37a.[4] The state court relied on state law in both assessing the extent of private property rights landowners in Nevada have in the usable airspace immediately above their land as well as the degree of constitutional protections that Nevadans enjoy under the Nevada Constitution from governmental interference with those property rights. *Id.*

Relying on several provisions of Nevada statutory law, including Nev. Rev. Stat. §§ 37.010(14), 493.030, 493.040, and 404.050(1)(a), the Court concluded "that Nevadans hold a property right in the useable airspace above their property up to 500 feet." Pet. App. 15a. The state court rejected petitioners' contention that federal law precluded state law recognition of any property rights in the immediate airspace above the surface of the land. Citing to *Griggs* v. *Allegheny County*, 369 U.S. 84, 88-89 (1962) and Federal Aviation Administration regulations, the state court noted that although federal regulations allow airplanes to "fly below 500 feet when necessary for takeoff

[4] While the case was on appeal, respondent sold the property to a third party. See Pet. App. 51a n.17. Based on the terms of that sale, which is consistent with Nevada law (see *Argier* v. *Nevada*, 114 Nev. 137, 952 P.2d 1390 (1998)), respondent retained the right to the proceeds of this lawsuit and the buyer purchased the land and airspace up to 66 feet.

and landing, this right does not divest the property owner of his protected property right to his usable airspace." Pet. App. 13a-14a. The court likewise rejected petitioners' contention that an avigation easement conveyed by respondent's predecessor in interest to petitioners, which applies to approximately half of respondent's property, precluded any claim that he could make to a property right in the usable airspace immediately above his property. *Id.* at 16a-17a. Construing the language of that easement, the court held that "it cannot be read to unconditionally transfer the airspace rights above Sisolak's property to the County." *Id.* at 16a.

The court next concluded that petitioners' ordinances amounted to an unconstitutional taking of respondent's property rights in the usable airspace immediately above his property because they "authorize the permanent physical invasion of his airspace." Pet. App. 23a. The court reasoned that the "ordinances exclude the owners from using their property and instead, allow aircraft to exclusively use the airspace as a critical departure area within an airport approach zone." *Id.* The court explained that respondent had presented "sufficient proof of a permanent physical invasion of his airspace" by introducing "evidence that airplanes fly lower than 500 feet above his property." *Id.*; *see id.* at 7a.

The court rejected petitioners' claim that the ordinances could not be characterized as permitting a permanent physical invasion because they do not themselves "direct the flight of aircraft in any way" and "the airplanes flying over [respondent's] property are not constantly occupying the airspace in a temporal sense." Pet. App. 25a-26a. The court explained that the "Ordinances grant airplanes permanent permission to traverse Sisolak's airspace" and the resulting invasion is "permanent because the right to fly through the airspace is preserved by the Ordinances and expected to continue into the future." *Id.* at 26a.

The court also discussed whether, as a matter of federal constitutional law, the constitutionality of the Ordinances was best analyzed under this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) or *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). Pet. App. 23a-27a. While the majority asserted that *Loretto* was the proper analysis and the dissent contended it should be *Penn Central* (a contention the majority described as "not unreasonable"), the majority ultimately decided "given the difficulty in applying the federal takings jurisprudence" it would "take this opportunity to clarify what constitutes a regulatory per se taking under our State Constitution." Pet. App. 28a.

Addressing the distinct state constitutional issue, the state supreme court stressed at the outset both the settled notion "that a state may place stricter standards on its exercise of the takings power through its state constitution" and that there "is no corollary provision in the United States Constitution" to the very "first right established in the Nevada Constitution's declaration of rights" for "the protection of a landowner's inalienable rights to acquire, possess and protect private property." Pet. App. 28a, *citing* Nev. Const. art. I, § 1. Looking also to the text of Article 1, Section 8(6)'s provision in the Nevada Constitution that private property shall not be taken for public use "without just compensation having first been made, or secured," and the court's own precedent, the state court explained that the "Nevada Constitution contemplates expansive property rights in the context of takings claims through eminent domain." *Id.* at 28a.

The state supreme court then squarely held that "under the Nevada Constitution, a per se regulatory taking occurs when a public agency seeking to acquire property for a public use * * * appropriates or permanently invades private property for public use without first paying just compensation." Pet. App. 29a. Applying that state constitutional standard to petitioners' ordinances

challenged in this case, the court held that because the ordinances "established a permanent physical invasion of the airspace above Sisolak's property, thereby appropriating the airspace for the County's use," their adoption "effectuated a per se taking of his property under the Nevada Constitution." *Id.* at 30a.

Finally, the state supreme court upheld the district court's award of attorney's fees and pre-judgment interest. Pet. App. 33a-36a. The court based its affirmance of the attorney's fee award on its construction of the meaning of a state statute, Nev. Rev. Stat. § 342.105(1), which imposes requirements on any state agency "which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 * * * and which undertakes any project that results in the acquisition of real property * * *." Pet. App. 34a-35a. The state court reasoned that because petitioners received federal money for the airport and were therefore "subject" to the federal statute and respondent "is a property owner who was successful in his inverse condemnation action" he was entitled to attorney's fees under the Nevada law *Id.* at 35a-36a

ARGUMENT

The petition should be denied for precisely the same reason that the Court dismissed the writ as improvidently granted more than forty years ago in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965). Although the petition neglects to cite *Jankovich*, the case is on all fours with the instant matter, with the only exception being that it is even clearer in this case than it was in *Jankovich* that certiorari is unwarranted.

Petitioners seek review of two legal issues. Pet. i. First, they ask (Pet. 22-26) this Court to review the question whether a federal constitutional takings challenge to local ordinances restricting the heights of buildings on private

property in the immediate vicinity of an airport for the purpose of allowing commercial aircraft to fly regularly below 500 feet during takeoff and landing should be determined based on this Court's rulings in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *United States* v. *Causby*, 328 U.S. 256 (1946) or *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978).[5] Second, they ask (Pet. 11-14) this Court to consider their legal argument that Congress, by authorizing the Federal Aviation Administration (FAA) to define "navigable airspace" in 49 U.S.C. § 40102(a)(32), including the airspace necessary for taking off and landing, preempted the States from creating in landowners private property rights as a matter of state law in that usable airspace immediately above their land.

The first proffered legal issue is jurisdictionally barred for the same reason that this Court dismissed the writ as improvidently granted in *Jankovich*. Here, as in *Jankovich*, the state supreme court rested its judgment that an unconstitutional taking of private property had occurred on an adequate and independent state ground: the Nevada Constitution. The Nevada court did so expressly and deliberately, and only after specifically directing the parties to submit post-argument briefs on the independent application of the Nevada Constitution to respondent's takings claim.

While no similar threshold jurisdictional bar applies to petitioners' second issue, review is not warranted for an even more basic reason. There is simply no merit to the argument. And, here again, *Jankovich* controls. Seeking to

---

[5] The petition alternatively poses the federal taking issue in terms of this Court's decisions in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), but that alternative phrasing suffers from the same jurisdictional obstacle as the *Loretto* vs. *Penn Central* issue that is the petition's primary focus: the state court's independent reliance on state law is adequate to support its judgment. See pages 10-19 & n.6, *infra*.

persuade the Court in *Jankovich* to retain jurisdiction, the petitioner in that case made the exact same argument advanced by petitioners here: a contention that federal law precluded state recognition of proprietary interests protected by a state constitution in the usable airspace immediately above private land. The *Jankovich* Court rejected the argument, concluding that "there is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." 379 U.S. at 494, *quoting* Memorandum of U.S. as Amicus Curiae, 2 n.2. Federal law is the same today as it was when *Jankovich* was decided, no court has held to the contrary, and the petition, accordingly, should be denied.

I. This Court Lacks Jurisdiction to Consider Petitioners' Proffered Federal Constitutional Taking Issue Because the State Court Rested Its Judgment on Adequate and Independent State Law Grounds

1. It is well settled that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991); see *Lee* v. *Kemna*, 534 U.S. 362, 375 (2002); *Lambrix* v. *Singletary*, 520 U.S.518, 522 (1997); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935) *Klinger* v. *Missouri*, 13 Wall. (80 U.S.) 257, 263 (1872). While it is sometimes uncertain whether a state court in fact rested its judgment on adequate and independent state grounds, *Michigan* v. *Long*, 463 U.S. 1032 (1983), "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, [this Court], of course, will not undertake to review the decision." *Id.* at 1041.

Here, the Nevada Supreme Court did just that, clearly

and expressly bottoming its ruling in state law in two distinct respects. The court first looked to state law in determining what property rights respondent had in the first instance in the usable airspace immediately above his land. And, second, the court then ultimately chose to rely on state, not federal, constitutional law, in concluding that petitioners' ordinances amounted to an unconstitutional taking of respondent's property rights.

As described above (page 5, *supra*), the state court looked to provisions of Nevada statutory law in concluding that Nevadans, such as respondent, "hold a property right in the useable airspace above their property up to 500 feet" and that such property rights of the surface owner extend to interference by planes flying below 500 feet with the owner's "current or *future use* of the property." Pet. App. 15a. (emphasis added). The court accordingly, rejected, as a matter of state law, petitioners' contention that a landowner's property rights extended only to existing uses of his land.

The court similarly relied on state law in rejecting petitioners' reliance on an avigation easement conveyed by respondent's predecessor in interest to petitioners. Relying on the language of the easement as set forth in a Nevada law (see Pet. App. 5a n.6, *quoting* Clark County, Nev. Code § 30.08.030 (2005)) and the state court's own precedent for construing the scope of governmental easements (see Pet. App. 16a, *quoting S.O.C., Inc.* v. *The Mirage Casino-Hotel*, 117 Nev. 403, 409, 23 P.3d 243, 247 (2001)), the state court held that "[t]he easement in this case does not contain any height restriction terms but is simply an overflight easement exacted by the County to preclude liability for aircraft noise." Pet. App. 16a. "[I]t cannot be read to unconditionally transfer the airspace rights above Sisolak's property to the County." *Id.* The court, therefore, treated the meaning of the easement's language as a matter of state law. There was no federal law dimension to that ruling capable of raising a distinct

federal law issue.[6]

No less clear are the independence and adequacy of the state supreme court's ultimate reliance on state constitutional law for its ruling that petitioners' ordinances amount to an unconstitutional taking of private property. To be sure, the court did discuss whether, as a matter of federal constitutional law, the constitutionality of the Ordinances would best be analyzed under this Court's decision in *Loretto* or *Penn Central*. Pet. App. 23a-27a. But, while the majority concluded that *Loretto* provided the more appropriate analytical framework, the majority ultimately decided that the very "difficulty in applying the federal takings jurisprudence" was the reason why it should "take this opportunity to clarify what constitutes a regulatory per se taking under our State Constitution." Pet. App. 28a.[7] Only after concluding that "under the

---

[6] For this reason, petitioners err in positing (Pet. i, 26-28) that this case presents an opportunity for this Court to consider the validity of the Nevada Supreme Court's discussion of the nexus and proportionality requirements for zoning exactions applied in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). The state court never even mentioned *Dolan* and, in light of the state court's threshold ruling interpreting the avigation easement previously conveyed to petitioners as pertaining only to noise as a matter of state law, the court's subsequent discussion of *Nollan* was at most dictum that had no bearing on the judgment in the case. Pet. App. 16a. Notably, the court's distinction between avigation easements that merely address noise and avigation "clearance" easements that address height limitations on the construction of buildings is a longstanding distinction in aviation law (see, *e.g.*, Melillo v. City of New Haven, 249 Conn. 138, 144 n.11, 732 A.2d 133, 139 n.11 (1999)), and is similarly reflected in federal regulations and acquisition policies See, *e.g.*, 32 C.F.R. §§ 644.23(a)(2)(v) (Air Force); 32 C.F.R. §§ 644.103, 644.114 (Army). No doubt for this reason, even in dissent, Justice Maupin noted below his "vigorous agreement with the majority's conclusion that the perpetual avigation easement conveyed to the County by Mr. Sisolak's predecessor did not abrogate his property interest in the airspace over the subject parcels." Pet. App. 52a n.21.

[7] The majority even expressly acknowledged that the dissent's view that *Penn Central* provided the better framework was "not

Nevada Constitution, a per se regulatory taking occurs when a public agency seeking to acquire property for a public use * * * appropriates or permanently invades private property for public use without first paying just compensation" (Pet. App. 29a), did the state court hold that petitioners' ordinances "established a permanent physical invasion of the airspace above Sisolak's property, thereby appropriating the airspace for the County's use" and therefore "their adoption effectuated a per se taking of his property under the Nevada Constitution." *Id.* at 30a.

2. Nor was there anything remotely incidental or ambiguous about the state supreme court's reliance on state statutory and constitutional law. Respondent raised the separate state constitutional law issue throughout the litigation, beginning with the complaint. NSC Rec. 1, 2 (Complaint ¶ 3). And, although the trial court did not distinguish between the state and federal constitutional claims, the Nevada Supreme Court plainly did, both carefully and deliberately.

Following oral argument, the state supreme court specifically directed the parties to address whether the state constitution could provide an independent and adequate state law ground for its judgment. The court ordered the parties, wholly apart from whether there was a taking under federal constitutional law, to address separately the question "whether there was a taking in this case under * * * the Nevada Constitution." Order Directing Supplemental Briefs, 1-2 (Nev. Sup. Ct. June 7, 2005). The order even added that "[s]hould counsel argue the Nevada Constitution applies independently from the holdings of *Loretto* or *Lucas*, counsel shall suggest the state law rule and the basis for it." *Id.* at 2 (footnote omitted). Both parties, accordingly, filed briefs addressing the distinct state constitutional law issues,[8] which is also why the

---

unreasonable." Pet. App. 28a.

[8] While petitioners chose to address the issue only in two short

majority later took sharp issue with a dissenting justice's suggestion "that the parties did not litigate whether there was a taking under our State Constitution." Pet. App. 28a n.80.

3. In light of the Nevada Supreme Court's clear and unambiguous reliance on Nevada statutory and constitutional law, this Court should deny the petition for the same reason that it dismissed the writ as improvidently granted in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965), more than forty years ago. At issue in *Jankovich* was the constitutionality of a municipal airport zoning ordinance that imposed on undeveloped property a restriction on the height of buildings to allow for the landing and takeoff of aircraft based on a 40:1 slope restriction (as compared to the much more limiting 80:1 slope restriction applicable to respondent's property). *Id.* at 488. The Indiana Supreme Court ruled that the restriction on future building violated the Indiana Constitution and the Due Process Clause of the Fourteenth Amendment. *Id.* at 489-90. Like the Nevada Supreme Court below, the Indiana court concluded that the airport zoning ordinance was not just a mere regulation of building height but an effort by a municipality '"to take and appropriate to its own use the ordinarily usable airspace of property adjacent to the Gary Airport.'" *Id.* at 493 (emphasis omitted), *quoting* 244 Ind. 574, 582, 193 N.E. 2d 237, 241 (1963). In dismissing the writ, this Court noted both that the Indiana Supreme Court, like the Nevada Supreme Court below, found the source of property rights in state law, and that the Indiana court, again like the Nevada Supreme Court below, relied on state constitutional law. *Id.* at 491-93.

---

paragraphs (see Appellants' Supplemental Brief, 13-14 (filed June 16, 2005), respondent submitted 17 pages of analysis, demonstrating the independent force of the Nevada Constitution based on its distinct language as well as excerpts from the 1863 debates surrounding its adoption. See Respondent Steve Sisolak's Supplemental Brief (filed June 28, 2005).

Indeed, the only meaningful distinction between this case and *Jankovich* is that in the latter, unlike in this case, the state supreme court was far less clear that its ruling was separately based on state constitutional law. *Id.* The Indiana Supreme Court "did not analyze separately the effect of the two provisions but considered them together" (*id.* at 490), requiring this Court to parse carefully the state court's reasoning in deciding whether the state court intended to present the state constitutional issue as a separate ground for its ruling. Here, by contrast, there is no similar ambiguity, making this an even far stronger case than *Jankovich* for concluding that the Court lacks jurisdiction to consider the federal constitutional issue.

II. Neither the Nevada Supreme Court's Allowance of an Attorney's Fee Award Nor Its Rejection of Petitioners' Federal Preemption Claim Resurrects this Court's Jurisdiction to Consider the Federal Taking Issue

Not only does the petition fail to cite even once to *Jankovich*, but it addresses the state law jurisdictional defect only in its final few paragraphs. See Pet. 29-30. Petitioners suggest two different ways to circumvent the jurisdictional barrier: (1) a claim that the state supreme court, notwithstanding its clear intent to the contrary, unwittingly rested a fraction of its judgment on federal constitutional takings law by providing for an attorney's fee award; and (2) a claim that a federal takings issue is presented because the state court rejected petitioners' claim that federal aviation law precluded state law recognition of private property rights in the usable airspace immediately above respondent's property. Both of petitioners' proposed jurisdictional end-runs fail.

1. Notably, in seeking to base jurisdiction on an attorney's fee award, the petition never questions that the Nevada Supreme Court intended to rest its takings judgment on an independent and adequate state ground.

The gravamen of petitioners' argument is instead that the state court failed to do so because it neglected to appreciate that one incidental aspect of its judgment – the attorney's fee award – must be deemed to rest on federal constitutional grounds because it includes "fees and costs awarded under the federal Uniform [Relocation Assistance and Real Property Acquisition Policies] Act." See Pet. 30. Petitioners, therefore, seek to use the attorney's fee portion of the judgment to create jurisdiction over the takings portion of the judgment, notwithstanding the state court's clear intent to rest its ruling and judgment on its reading of the state constitution.

In no event should such a jurisdictional bootstrap be deemed sufficient, but petitioners' reasoning is in all events flawed. Petitioners' mistake lies in their incorrectly assuming that the attorney's fee award was based on a ruling that the ordinances violated the federal constitution rather than the state constitution.

Missing from the petition is any reference to the Nevada *state law* statutory provision upon which the attorney's fee award was in fact based. The state court did not base the attorney's fee award in the first instance simply on federal law. The attorney's fee award was instead based on state law, specifically, Nev. Rev. Stat. § 342.105, which provides that any agency of the state "which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and the regulations adopted pursuant thereto, and which undertakes any project that results in the acquisition of real property" shall provide displaced persons with specified assistance. In particular, the state must "provide relocation assistance and make relocation payments to each displaced person and perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements." *Id.* Both the Nevada Supreme Court and the trial court applied this

provision of Nevada statutory law in concluding that an attorney's fee award was appropriate. See Pet. App. 34a-35a; NSC Rec. 4851-52. Both those courts, moreover, rejected petitioners' arguments that the state law did not apply in this case either because respondent was not a "displaced person" or because there were insufficient federal monies to trigger the state law's requirements. *Id.*

Now, for the first time, petitioners present an argument never once raised below when petitioners contested the applicability of Nev. Rev. Stat. § 342.105 on other grounds. They now argue that the Nevada fee-shifting provision applies only if the state court concludes that the taking occurred as a matter of federal constitutional law and has no applicability if the state court concludes that the taking occurred as a matter of state constitutional law and therefore the judgment must be deemed to rest on a holding of a violation of federal constitutional law. Whether petitioners are correct on the merits itself presents, however, a state law issue: the meaning of the Nevada statutory phrases "which undertakes any project that results in the acquisition of real property" and "provide relocation assistance and make relocation payments." Petitioners' argument is a state law argument: that the Nevada legislature must have intended to trigger the payment requirements of the Uniform Relocation Act only if the "acquisition of real property" was mandated by the federal takings clause rather than by Nevada's own Constitution.

The short answer to petitioners' argument is that the Nevada Supreme Court otherwise made quite clear that it sought to rest its judgment in this case independently on state constitutional law and petitioners never raised before that court the state law claim of statutory construction that it now raises before this Court, which is that Nevada statutory law does not allow for the attorney's fee to be based on an "acquisition of real property" mandated by

state constitutional law.[9] Petitioners did not raise this issue when directly asked by the state court to brief the Nevada constitutional issue, including its ability to apply "independently" of federal law. Nor did they raise the issue in any subsequent rehearing petition filed with the state supreme court after the issuance of its judgment. Whatever the reason for petitioners' failure to raise this state law argument until its petition before this Court, there is plainly no jurisdiction in this Court now to address it.

2. Petitioners' second suggested basis for finding jurisdiction to consider the federal taking issue is no more persuasive. The petition alternatively argues that the Court can reach the federal question whether the challenged Ordinances should be analyzed under *Loretto* or *Penn Central* because the Nevada Supreme Court rejected, as a threshold matter, petitioners' claim that federal law preempted any state law recognition of property rights in the usable airspace immediately above privately owned land. According to petitioners (Pet. 29), this presents "an error of federal, not state law."[10]

---

[9] The opposing argument, completely consistent with the state statute's language, is that once the receipt of federal monies renders a state agency "subject" to the federal Relocation Act, the state law does not further require that the "acquisition of real property" be compelled by the federal takings clause rather than, as here, by the Nevada Constitution.

[10] Petitioners also appear to suggest (Pet. 29), albeit cryptically, that the state court affirmatively relied on federal law for the *creation* of a property right by "rel[ying] on FAA regulations to determine the scope of [respondent's] ownership right." That is certainly not true. The lower court considered the meaning of federal regulations only to the extent necessary to reject petitioners' preemption claim that federal law "divest[ed] the property owner of his protected right to his usable airspace" (Pet. App. 13a-14a). The court did not purport to find the source of that property right in federal law any more than this Court did in *Causby*, cited by the court below. In *Causby*, as here, the Court ruled that federal law did not *preclude* state law recognition of property rights, not that federal law *created* that property right in the first instance. The Nevada Supreme Court's opinion makes clear that

Petitioners are mistaken. While petitioners are right that the question whether federal law preempts state property law does present a distinct question of federal law, they are wrong in their contention that such a threshold question of federal law would provide a basis for the Court's addressing the separate federal takings question whether the Ordinances should be analyzed under *Loretto* or *Penn Central*. Whether this Court should grant review to consider petitioners' proffered federal preemption issue depends on whether that distinct issue, standing alone, warrants review. For the reasons set forth below, however, it most certainly does not.

---

the court looked to state statutory law and state constitutional law as the affirmative source of a landowner's property rights and simply rejected petitioners' preemption of state property law defense. See Pet. App. 14a-15a, citing Nev. Rev. Stat §§ 37.010(14), 493.030, 493.040, 493.050(1)(a). The state court's holding in this respect is entirely consistent with the way the case was argued before that court. Petitioners argued that "[t]he federal navigation servitude imposed on airspace nationwide * * * precluded [respondent's] takings claim as a matter of law." Appellants' Opening Br. 14; see *id.* at 14-16. Respondent never suggested that federal law instead created a property right, but instead correctly argued below that "[t]he usable airspace above land is a recognized component of property ownership in Nevada" (Appellee's Answering Br. 15; see *id.* at 15-17) and refuted petitioners' contention that federal law precluded such state property law by demonstrating that "[t]he right of airplanes to utilize public airspace does not destroy the right of landowners to compensation when their super-adjacent airspace is used regularly as a government designated airport runway approach right of way." *Id.* at 17; see *id.* at 17-20.

III. Review is Not Warranted of Petitioners' Contention that Federal Law Preempts the Nevada Supreme Court's Recognition as a Matter of State Law of Respondent's Property Rights in the Usable Airspace Immediately Above His Land and Their Protection by the Nevada Constitution

The second legal issue that petitioners contend warrants this Court's review is their claim that federal law preempts state law recognition of property rights in the usable airspace immediately above privately-owned land, including respondent's ten-acre parcel. They argue (Pet. 2, 16) that this is a "critically important question that this Court has never addressed" and that the airspace immediately above respondent's land is "is by definition within the navigable airspace and consequently the public domain, because it is situated in an area that is essential to ensure the safe takeoff and landing of aircraft." Petitioners' primary authorities in support of their contention are 49 U.S.C. § 40102(a)(32), which authorizes the FAA to define the "navigable airspace," including "airspace needed to ensure safety in the takeoff and landing of aircraft," and 14 C.F.R. § 91.119, in which the FAA created an exception to the regularly-applicable lower boundary for aircraft when lower altitudes are "necessary for landing and takeoff." See Pet. 13.

1. Unlike the federal taking issue, this federal preemption claim is not jurisdictionally barred. It simply lacks any possible merit, which is why one can find no support for petitioners' claim in any decision of any court, in the language of the relevant federal aviation statute, or in any assertion of legal authority made by the FAA, which is the federal agency charged by Congress for implementing that statute.

Petitioners are even wrong in their threshold assertion that this Court has never addressed the issue. Left

unmentioned by the petition is that the petitioner in *Jankovich* raised the precise same legal issue more than forty years ago in an identical effort to circumvent the jurisdictional bar presented by the Indiana Supreme Court's resting its ruling of unconstitutionality on state constitutional law. The *Jankovich* petitioner, just like the petitioners in this case, argued that the presence of this threshold question of federal law, meant that the state supreme court's reliance on state constitutional law could not be considered an "adequate" basis to support its judgment of a state constitutional taking.

Indeed, the *Jankovich* petitioner made essentially the same argument advanced by petitioners in this case more than four decades later. Jankovich argued that state supreme court reliance on state constitutional law could not possibly provide an adequate and independent state law ground precluding Supreme Court review because such a ruling would, in effect, be preempted because "[t]he federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. The total nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme." Brief for Petitioner, 53-54, in *Jankovich* v. *Indiana Toll Road Comm'n.*

The Solicitor General, in turn, filed an amicus brief in *Jankovich* that took direct issue with the *Jankovich* petitioner's argument concerning the preemptive effect of federal aviation law on state law recognition of property rights in the usable airspace immediately above privately-owned land and the related adequacy of the state court judgment. See Memorandum for the United States as Amicus Curiae, 2 n.2, *in Jankovich* v. *Indiana Toll Road Comm'n.* The Solicitor General advised this Court that "[t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning

power or defeats any State law right to compensation." *Id.*

In subsequently dismissing the writ as improvidently granted, the Court embraced the position of the U.S. by quoting its brief *verbatim* in concluding that "'there is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation'" *Id.* at 494, *quoting* U.S. Amicus Memorandum, 2 n.2.[11] Describing the preemption claim as "insubstantial," the Court held "that the decision of the Supreme Court of Indiana in this case is compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 494-95 & n.2

2. Nothing that has happened since *Jankovich* suggests a different result now. The relevant federal statutory language and FAA regulations are no different today than they were then. *Compare* 49 U.S.C. § 40102(a)(32) (2006) *and* 14 C.F.R. § 91.119 (2006) *with* 72 Stat. 739, 49 U.S.C. § 1301(24) (*quoted in Griggs*, 369 U.S. at 88) *and* 14 C.F.R. § 60.17 (1965) (*quoted in Griggs*, 369 U.S. at 88n.1). Federal law in no manner limits the authority of states to recognize property rights in the usable airspace immediately above privately owned land and then to

---

[11] This Court's ruling in this respect accords entirely with its earlier decision in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). In *Griggs*, the Court rejected the extreme notion that the meaning of the federal statutory definition of navigable airspace is that landowners cannot have private property rights in airspace below 500 feet that airplanes need for takeoff and landing: "But as we said in the *Causby* case, the use of land presupposes the use of some airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected * * *." *Id.* at 88-89. Further acknowledging that "[w]ithout the 'approach areas,' an airport is indeed not operable," the Court reasoned that an airport operator must therefore "acquire some private property" and that the airport in *Griggs* "by constitutional standards * * * did not acquire enough." *Id.* at 90. The *Griggs* Court, accordingly, flatly rejected any notion of federal preemption of state property law by making clear that any taking resulting from airport operation is a taking by "the local authority" and not by the "federal government." *Id.* at 89.

protect those rights through their own state constitutions.

For instance, the Airport and Airway Improvement Act of 1982, Pub L. 97-248, 96 Stat. 324, 671 (1982), makes the removal of hazards to the takeoff and landing of aircraft a condition of federal funding of airports, but then expressly provides that zoning laws should be used to achieve that end only "to the extent reasonable" and that federal funds can be properly expended for "the acquisition of land or interests therein or easements through or other interests in airspace." Sections 511(a)(4), (a)(5), 513(a)(2), 96 Stat. 687-88, 689. FAA regulations are, not surprisingly, to similar effect. A firm condition of the receipt of federal aid to airports for new airports, existing airports, new runways, and improvements of existing runways is that "the sponsor must own, acquire, or agree to acquire an adequate property interest in runway clear zones." 14 C.F.R. §§ 151.11(a)-(d). FAA regulations further provide that, to demonstrate an adequate runway clear zone, "an airport operator or owner is considered to have an adequate property interest if it has an easement * * * giving it enough control to rid the clear zone of all obstructions * * * and to prevent the construction of future obstructions * * * * " (*Id.* § 151.9(c)). Finally, while FAA regulations do expressly acknowledge the possibility that a local government may choose to try to utilize land use regulation instead of easement acquisition to guard against land uses that create aviation hazards, the agency also expressly acknowledges that such regulations may not be an adequate substitute for navigation easement acquisition because height limitations could be considered "unreasonable in view of current and future foreseeable use of the property" and therefore not "a reasonable exercise of the police power." 14 C.F.R. § 151.11(f). The FAA treats the question as exclusively one of state law and, accordingly, seeks assurances from the airport operator or owner in the form of a "legal opinion" regarding the reasonableness of such height restrictions.

Id.[12]

3. For this reason, it is not surprising that the decision of the Nevada Supreme Court that federal law does not preclude state law recognition of property rights in the usable airspace immediately above privately owned land does not conflict with any decision of this Court or indeed of any other court, let alone any federal circuit courts or other state supreme courts. In none of the cases cited by petitioners (Pet. 20-21) was the issue even raised whether a state could recognize some property interests below 500 feet in the airspace immediately above land.

For instance, petitioners' support for their claim (Pet. 21) that the decision below conflicts with decisions of the Federal Circuit relies on two cases: *Air Pegasus of D.C., Inc.* v. *U.S.*, 424 F.3d 1206 (2005) and *Palm Beach Isles Associates* v. *U.S.*, 208 F.3d 1374 (2000), *overruled on other grounds, Bass Enters. Prod. Co.* v. *U.S.*, 381 F.3d 1360 (2004). Neither remotely supports petitioners' claim.

In *Air Pegasus*, the court rejected a claim by an operator

---

[12] An official FAA guidance document, Advisory Circular 150/5190-4A "A Model Zoning Ordinance to Limit Heights of Objects Around Airports" (12/14/87), reproduced in the record below (NSC Rec . 4718) and cited by petitioners (Pet. 6), makes even clearer the FAA's position that federal law does not preempt state property law in this respect: "Any height limitations imposed by a zoning ordinance must be 'reasonable,' meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation under *local law*" (¶ 5d). NSC Rec. 4721 (emphasis added). All other FAA guidance is in accord. See, *e.g.*, FAA Discussion Paper on Zoning for Airports (9/8/87) (reproduced at NSC Rec. 4738) ("As zoning law is individual to each state the state statutes must be referred to, to determine the extent of zoning authority"); FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, I-2 (2005) ("While the FAA can provide assistance and funding to encourage compatible land development around airports, it has no regulatory authority for controlling land uses to protect airport capacity."); *id.* at VII-6 ("Traditional zoning techniques will not suffice in all cases to control land use around airports" and the related need for "[t]aking into account specific state statute limits").

of a commercial helicopter business that he had a property right to continue to use the navigable airspace. But, in reaching that result, the court stressed that it was "not consider[ing] the extent to which Air Pegasus, as a lessee of the South Capitol Street property, has the right to use non-navigable airspace immediately above its leasehold." 424 F.3d at 1217. And the court quoted this Court's decision in *Causby* regarding that "'it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected * * *.'" *Id., quoting Causby*, 328 U.S. at 264. The Federal Circuit's decision in *Palm Beach Isles*, however, is even further afield. The taking issue in that case did not even involve airspace at all, but only the federal government's longstanding navigation servitude in navigable *waters* of the United States. 381 F.3d at 1384.

The other cases cited by petitioners are equally unsupportive. They at most stand for the proposition that state courts have held that circumstances exist when height limitations do not constitute a taking as a matter of federal constitutional law. Those rulings, however, are wholly inapposite to the distinct question whether federal law preempts states from deciding *as a matter of state law* to recognize property rights in the usable airspace immediately above privately-owned land and to protect those rights as a matter of state constitutional law. In none of those cases did the court dispute that state law could provide *more* protection of private property rights. Nor did any of those courts ever intimate that federal aviation law precluded state law from doing so. See, *e.g.*, *City of Austin* v. *Travis County Landfill Co.*, 73 S.W.3d 234, 239 (Tex. 2002) ("we assume, without deciding, that the federal and state constitutions provide the same protections from overflight effects"). In no event, therefore, can these decisions support petitioners' claim that there exists a conflict in the lower courts necessitating this Court's review of petitioners' federal preemption

issue.

IV. Petitioners Mischaracterize the Nevada Supreme Court's Ruling and Exaggerate Its Importance

Petitioners argue that review is warranted because the "staggering potential liability" created by the state court's decision "will have significant and deleterious ripple effects that threaten the safety and efficiency of the national air transportation system." Pet. 12, 14. At least as depicted by the petition, the "devastating impact on the airport and the region at large" of "liabilities in the billions of dollars," would seem likely to render the City of Las Vegas into a virtual ghost town. Pet. 3, 14, 16.

The Court, however, need not worry. The decision of the Nevada Supreme Court has not placed either the nation's air transportation system or the City of Las Vegas at risk. The state court's ruling is far more limited than petitioners suggest and the court squarely rejected petitioners' specter of massive liability.

1. While "*per se*" in name, the state court's application of its state constitutional law takings test is noticeably limited in its actual reach. The judgment affirmed by the court compensated respondent for a taking of airspace only above 66 feet, even though Ordinance 1599 imposed a presumptive height limitation of 3 to 10 feet. The court assumed that respondent would be able to obtain a variance to build up to 66 feet because petitioners had granted such a variance in the past (see page 3 n.2, *supra*). The court also made clear that "[l]ike most property rights, the use of the airspace and subadjacent land may be the subject of valid zoning and related regulations which do not give rise to a takings claim." Pet. App. 15a n.25. The court carefully explained that the height restrictions at issue here ran afoul of the state constitution because they were more than "use restrictions"; their central purpose

was to allow for the "permanent physical invasion of the airspace" immediately above respondent's land by commercial aircraft, "thereby appropriating the airspace for the County's use." *Id.* at 30a.[13]

Noticeably absent from the petition is any citation to the record in support of petitioners' unilateral assertion (Pet. 14) that the decision below will "conservatively" result in billions of dollars in liability to them. Even more important, the state court rejected those claims. The court found that the impact of its ruling on petitioners would be limited both because they could trade public property for private property needed for airport operations and because "[o]nly a limited number of property owners are affected by the most onerous restrictions in Ordinances 1221 and 1599, while the remaining property is already owned by McCarran Airport or the University of Nevada, Las Vegas." Pet. App. 30a n.88.[14]

---

[13] The petition also ignores the obvious extent of the significant interference with the airspace immediately above respondent's land indisputably contemplated by petitioners' ordinances. Petitioners did not designate respondent's property a "runway approach area" and "critical departure zone" and impose correspondingly severe height limitations for no reason. Petitioners' intent is to improve and expand the existing runways in order to allow increased commercial air traffic, including the takeoff and landing of aircraft immediately over respondent's land at what petitioners acknowledge is already the nation's "fifth largest airport" (Pet. 5). According to petitioner McCarran Airport's own website, the number of landings at the airport has been dramatically increasing. Landings increased 20 percent between 1996 and 2001, and 35 percent between 1996 and 2005. See http://cms.mccarran.com/dsweb/Get/Document-27400/1996-2001%20Landings%20by%20Airlines.pdf. As of October 2006, landings had increased by an additional 3 percent since just last year. See http://cms.mccarran.com/dsweb/Get/Document-1510/Total%20Landings%20by%20Airline%20July%20-%20December%202006.pdf.

[14] Petitioners' dire claims of looming financial disaster also lie in sharp contrast to their recent Comprehensive Financial Report for the Airport for 2005, which in the aftermath of their district court loss in this case describes the inevitable uncertainty in then-pending inverse condemnation litigation, predicts the possibility of "multi-million dollar" settlements, and reassuringly provides that "it is the opinion

2. The nation's air transport system will also clearly survive the Nevada Supreme Court's opinion. Nevada is hardly the first state to have a court conclude that height limitations imposed in order to allow for aircraft takeoff and landing can amount to a taking of private property requiring the payment of just compensation. Others courts have reached similar conclusions in the past without calamitous results to air transportation in the succeeding decades. See, *e.g.*, *McShane* v. *Faribault*, 292 N.W.2d 253 (Minn. 1980); *Hageman* v. *Board of Trustees*, 20 Ohio App. 2d 12, 251 N.E. 2d 507 (Ohio Ct. App. 1969); *Roark* v. *City of Caldwell*, 87 Idaho 557, 394 P. 2d 641 (1964).

Indeed, here again, more than forty years ago the petitioner in *Jankovich* offered the same doomsday scenario in the aftermath of the Indiana Supreme Court's decision that petitioners now advance in the wake of the decision of the Nevada Supreme Court below. The *Jankovich* petitioner predicted that "the inevitable consequence" of the Indiana Supreme Court's decision would be the imposition of liability that would be "financially prohibitive," "price[] airports out of existence in Indiana," and "thus cripple[]" the national transportation system. See Brief for Petitioner 55, *in Jankovich* v. *Indiana Toll Road Comm'n*. The *Jankovich* petitioner's prophecy, however, was not realized. The nation's air transportation system and the State of Indiana are doing well. There is no plausible basis for supposing that petitioners' exaggerated rhetoric has any more credibility today than did the *Jankovich* petitioner 's in 1965.

---

of Counsel that resolution of these matters will not have a material adverse effect on the future financial condition of the Airport." See Clark County Dept. of Aviation, Comprehensive Annual Financial Report, 51 (2005) (reproduced at http://cms.mccarran.com /dsweb /Get/ Document-101847/Comprehensicve%20Annual%20Financial %20Report%20June%2030,%202005.pdf).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAURA WIGHTMAN FITZSIMMONS*
3216 WEST CHARLESTON
SUITE A
LAS VEGAS, NEVADA 89102
(702) 382-5333

Counsel for Respondent

* *Counsel of Record*

January 12, 2007

APPENDIX

NEVADA CONSTITUTION

Nevada Constitution, Art. 1

Section. 1. Inalienable rights. All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness

Section 8. Rights of accused in criminal prosecutions; jeopardy; rights of victims of crime; due process of law; eminent domain.

* * * * *

6. Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made

NEVADA STATUTES

Nev. Rev. Stat. § 37.010. Public Purposes for which right of eminent domain may be exercised.

* * * * *

(14) Aviation. Airports, facilities for air navigation and aerial rights-of-way.

Nev. Rev. Stat. § 342.105. Compliance with federal law required; adoption of regulations by Director of Department of Transportation.

1. Any department, agency, instrumentality or political subdivision of this State, or any other public or private entity, which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and the regulations adopted pursuant thereto, and which undertakes any project that results in the acquisition of real property or in a person being displaced from his home, business or farm, shall provide relocation assistance and make relocation payments to each displaced person and perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements.

2. The Director of The Department of Transportation shall review the federal act and all amendments and regulations adopted pursuant thereto and adopt such regulations as he finds are necessary to enable the State of Nevada to comply with those federal requirements.

Nev. Rev. Stat. § 493.030. Sovereignty in space.

Sovereignty in the space above the lands and waters of this state is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the state.

Nev. Rev. Stat. § 493.040. Ownership of space.

The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Nev. Rev. Stat. § 493.050.

Nev. Rev. Stat. § 493.050. Lawfulness of flight and landing; liability for forced landing.

1. Flight in aircraft over the lands and waters of this state is lawful:

(a) Unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner.

(b) Unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.

2. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, the owner, lessee or operator of the aircraft is liable as provided in Nev. Rev. Stat. § 493.060.

FILED
JAN 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-658

IN THE

Supreme Court of the United States

MCCARRAN INTERNATIONAL AIRPORT
AND CLARK COUNTY, A POLITICAL SUBDIVISION
OF THE STATE OF NEVADA,

Petitioners,

v.

STEVE SISOLAK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF OF PETITIONERS

DAVID J. J. ROGER
DISTRICT ATTORNEY
E. LEE THOMSON
DEPUTY DISTRICT ATTORNEY
500 South Grand Central Parkway
Fifth Floor
Las Vegas, Nevada 89109
(702) 455-4761

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PETER R. STEENLAND
PETER C. PFAFFENROTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record
[Additional Counsel on Inside Cover]

January 23, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

KIRK B. LENHARD
R. DOUGLAS KURDZIEL
SCOTT M. SCHOENWALD
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89109
(702) 862-3300

LORI POTTER
DANIEL S. REIMER
THOMAS R. DEVINE
ARTHUR P. BERG
KAPLAN KIRSCH &
ROCKWELL LLP
1675 Broadway
Suite 2300
Denver, Colorado 80202
(303) 825-7000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONERS	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Air Pegasus of D.C., Inc. v. *United States*, 424 F.3d 1206 (Fed. Cir. 2005) 4, 6
City of Austin v. *Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002) 6
City of Reno v. *Reno Gazette-Journal*, 63 P.3d 1147 (Nev. 2003) 9, 10
County of Clark v. *Hsu*, No. 38853 (Nev. Sept. 30, 2004) 7
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 4, 6
Indiana Toll Road Comm'n v. *Jankovich*, 193 N.E.2d 237 (Ind. 1963), *certiorari dismissed*, 379 U.S. 487 (1965) 1
Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) 1, 2
United States v. *Causby*, 328 U.S. 256 (1946) 3, 6

STATUTES AND REGULATION

42 U.S.C. § 4654(c) 9
49 U.S.C. § 47107 5
Nev. Rev. Stat. § 244.281(1)(c) (2004) 8
Nev. Rev. Stat. § 244.281(1) (2006) 8

OTHER AUTHORITIES

Clark County Dep't of Aviation, *Clark County, Nevada Airport System Subordinate Lien Revenue Bonds Series 2006A (Non-AMT)* (Aug. 30, 2006) 7, 8
Clark County Dep't of Aviation, *Comprehensive Annual Financial Report of the Year Ended June 30, 2005* (2005), *available at* http:cms.mccarran.com/dsweb/Get/Document-101847 7

TABLE OF AUTHORITIES—continued

Page

FAA, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* (Dec. 14, 1987) 5

REPLY BRIEF OF PETITIONERS

In its unprecedented ruling, the Nevada Supreme Court held that federal law does not preempt a landowner's state-law right to exclude the public from up to 500 feet of "navigable airspace" that Congress placed in the public domain to ensure safe takeoffs and landings. Respondent's claim that the Court deemed this preemption issue "insubstantial" in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965), is demonstrably false. In fact, the Nevada court's preemption ruling conflicts with the decisions of this and other courts. Nor does its takings judgment rest on state law: the judgment includes a $2 million fee award that inescapably rests on the court's finding of a "*per se*" taking under the Federal Constitution. Respondent's glib assurance that petitioners and the nation's aviation system can easily absorb the staggering potential liabilities that the decision creates is disingenous. The filing of an extraordinary *amicus* brief by nearly the entire industry confirms that this is the most important aviation case to reach this Court in over a generation.

1.a. Respondent concedes that the preemption issue petitioners raise is "a distinct question of federal law" that "is not jurisdictionally barred." Opp. at 19-20. His claim that this is "the precise same legal issue" dismissed in *Jankovich*, Opp. at 20-21, is flatly wrong and reflects a complete misunderstanding of petitioners' claim.

Jankovich involved an ordinance that imposed an 18-foot height limit on toll road property, thereby barring operation of a road built 30 feet above ground. 379 U.S. at 488. Because the state court found a taking under both federal and state law, the property owner argued that this Court lacked jurisdiction to review the decision. In response, the airport operators argued that the state court based its finding of a taking on much more than the ordinance's effect on the toll road property; it had deemed the ordinance "wholly void" and "invalid as an entirety." *Indiana Toll Road Comm'n* v. *Jankovich*, 193

N.E.2d 237, 241-42 (Ind. 1963). The airport operators argued that this ruling "signif[ied] the total nullification of airport zoning," and that such state-law nullification of airport zoning was preempted by "the policy of the Federal Airport Act," which deemed local airport zoning "essential to assur[ing] compatible land use" near airports. *Jankovich*, 379 U.S. at 492-93 (summarizing airport operators' argument).

The Solicitor General disavowed the operators' suggestion that federal law mandated airport zoning, and that a "State law forbidding airport height-limitation zoning would . . . violate the Supremacy Clause." Memorandum for the United States as *Amicus Curiae* at 2 n.1, in *Jankovich* v. *Indiana Toll Road Comm'n* ("U.S. *Jankovich* Mem."). Because federal law required a grantee to adopt zoning restrictions only "[i]nsofar as it is within its power," the Solicitor General stated that there was "no basis for a conclusion that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." *Id.* This Court, in turn, deemed the preemption claim "insubstantial" because it did not read the Indiana Supreme Court's opinion to "portend the wholesale invalidation of all airport zoning laws." 379 U.S. at 492-93 & n.2.

Here, petitioners are not arguing that federal law mandates airport zoning or bars a state court from ever ruling that an airport zoning law effects a taking under a state constitution. Petitioners claim that, by granting the public the right to use the "navigable airspace," federal law necessarily preempts a state-law right to exclude the public from hundreds of feet of unused navigable airspace. This Court has never deemed this claim "'insubstantial.'" Opp. at 22. To the contrary, this preemption claim is based on this Court's decisions and federal statutes and regulations that were never mentioned in *Jankovich*. It is also fully consistent with the United States' submissions in *Jankovich* and later cases.

In *United States* v. *Causby*, this Court held that federal law abolished the common law doctrine of absolute ownership of

superadjacent airspace. 328 U.S. 256, 261 (1946). "The air is a public highway," and recognizing "private claims to the airspace would . . . transfer into private ownership that to which only the public has a just claim." *Id.*; see also *id.* at 264 (the Air Commerce Act placed navigable airspace "within the public domain"). At the same time, *Causby* also made clear that the public's right to use navigable airspace did not override a landowner's interest in use of underlying land. Because continuous invasions of superadjacent airspace at low altitudes "affect the use of the surface of the land," the Court held that overflights that "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land" effect a taking. *Id.* at 265-66.

Petitioners thus recognize that zoning laws that ensure the safety of low-altitude overflights can, like overflights themselves, so interfere with the right to use and enjoy land that it effects a taking of land. A claim that a height limit to protect navigable airspace is so "close to the ground," U.S. *Jankovich* Mem. at 2, that it prevents use of the land (as the 18-foot limit in *Jankovich* did) or destroys a pre-existing use of land (as the overflights did in *Causby*) is not preempted. "But it does not follow" that a landowner's right to use superadjacent airspace "is absolute and is not subject to reasonable regulation in the public interest." U.S. *Jankovich* Mem. at 9.

In this case, however, the Nevada Supreme Court did recognize an absolute property right to exclude the public from hundreds of feet of navigable airspace. Respondent tries to downplay the scope of this ruling, insisting that he was deprived of airspace "immediately above" his property. But the court expressly held that "Nevadans hold a property right in the useable airspace above their property *up to 500 feet*," and that respondent offered "'sufficient proof'" of a taking by showing "that airplanes fly lower than *500 feet* above his property." Pet. App. 15a, 23a (emphases added; footnote omitted). Respondent did not and could not claim that the ordinances' height restrictions destroyed an existing use of his

property (there was none) or deprived him of all commercial use of his property (the County authorized construction of a 600-room casino hotel, see *id.* 5a-6a). In fact, despite his misleading suggestion, Opp. at 27 n.13, respondent dismissed his claim that overflights so interfered with use of his land as to effect a taking. Pet. App. 9a. Instead, he based his damages on the "'best use'" of his property, which allegedly required hundreds of feet of navigable airspace. Opp. at 4.

State recognition of unqualified ownership of hundreds of feet of navigable airspace is preempted by federal law. This is so not because federal law encourages airport zoning, but because state recognition of an absolute right to exclude the public from such airspace is flatly inconsistent with the public's right under federal law to traverse this airspace. Absent a showing that use of navigable airspace—or zoning limits to protect it—effect a *Causby*-type taking of land, the federal right of transit must prevail over a state-law right to exclude. Indeed, since *Jankovich*, the United States has argued that, absent pre-existing use of airspace, ownership of land "never include[s] the right to exclude the public from the navigable airspace above [the] land." Opp. of United States at 13, *Breneman* v. *United States*, No. 03-2616 (1st Cir. filed Feb. 17, 2004) *available at* 2003 WL 23899334, at *13; see also *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206, 1214 (Fed. Cir. 2005) (noting the government's position that navigable airspace is "not available for private ownership").

This Court has never "flatly rejected," Opp. at 22 n.11, the claim that federal law preempts a state-law property right to exclude the public from hundreds of feet of navigable airspace. In *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), the Court found a taking where overflights rendered an existing home uninhabitable. *Griggs* thus rejected the extreme notion, not argued by petitioners here, that the public's right to use the navigable airspace overrides a landowner's right to continue a pre-existing use of underlying land. And, as noted,

Jankovich involved a zoning restriction that was so severe that it effected a *Causby*-type deprivation of the land itself.

The preemption claim in *Jankovich* was thus entirely different than the one raised here. The toll road owner did not claim an absolute right to exclude the public from hundreds of feet of navigable airspace. And the *Jankovich* petitioners relied on a federal "policy" of encouraging airport zoning, not a law explicitly granting the public a right of transit through navigable airspace. The fact that this statutory provision has not changed since *Jankovich* was decided, Opp. at 22, is thus utterly irrelevant, as this law was not discussed in the case.

Nor do the other provisions respondent cites cast any doubt on the preemption claim raised here. The statutory admonition that zoning laws be used "to the extent reasonable," 49 U.S.C. § 47107(a)(10), merely recognizes that some height limits can be so onerous that they effect a *Causby*-type taking of land.[1] In such cases, Congress expected local authorities to prevent hazards by purchasing land or easements, which is why it permits the use of federal funds for such purposes. See *id.* § 47107(c)(1)(A)(i). The other regulations respondent cites, Opp. at 23, likewise simply recognize the limits on use of very low height restrictions to prevent air hazards. Such a recognition does not remotely support the notion that the federal right to traverse the navigable airspace is somehow compatible with a state-law right to exclude the public from hundreds of feet of navigable airspace.

b. The Nevada court's preemption ruling plainly conflicts with decisions of this and other courts. In *Causby*, this Court stressed that superadjacent airspace is not a private domain but "a public highway" that Congress can place in "the public

---

[1] Indeed, the FAA guidance respondent cites, Opp. at 24 n.12, makes precisely this point. *See* FAA, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* § 5.d (Dec. 14, 1987) (height restrictions "should not be so low at any point as to constitute a taking of property without compensation[]").

domain." 328 U.S. at 264. Although the Court recognized that, to use land, a landowner must control some superadjacent air, the facts of *Causby* and *Griggs* make clear "the immediate reaches of the enveloping atmosphere" do not extend 500 feet or ensure the best possible use of the land.[2]

The decision in this case, moreover, squarely conflicts with those in *Air Pegasus* and *City of Austin* v. *Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002). Citing the same federal law petitioners cite, the Federal Circuit held that the plaintiff had no cognizable property interest because "it is well established under federal law that the navigable airspace is public property not subject to private ownership." *Air Pegasus*, 424 F.3d at 1217. The Federal Circuit thus held that federal law precludes recognition of a state-law property right in navigable airspace; the Nevada court held that it did not. And, because the preemption claim here and in *Air Pegasus* hinged on the scope of ownership rights in *navigable* airspace, it is irrelevant that the Federal Circuit did not consider Air Pegasus's "'right to use *non-navigable* airspace,'" Opp. at 25 (emphasis added).

Similarly, while the Nevada court recognized a right to exclude the public from navigable airspace, the Texas Supreme Court has held that a landowner "has no right to exclude overflights above its property, because airspace is part of the public domain." *City of Austin*, 73 S.W.3d at 241-42 (citing *Causby*). Respondent deems this conflict immaterial because the Texas court assumed that state and federal constitutional protections were the same. Opp. at 25. But this is irrelevant. Federal law does not preempt the *protections* a state constitution affords property rights, but rather state *recognition* of an absolute right to exclude the public from navigable airspace.

c. Although these clear conflicts alone justify review of the preemption issue, the significant harm that the Nevada court's

---

[2] Causby's house and barn were 16 and 20 feet high. 328 U.S. at 258 n.3. Griggs' house was 36 feet high. *Griggs*, 369 U.S. at 86.

decision will inflict on McCarran and the national aviation system make review imperative. Respondent's claims to the contrary are at best wrong, and at worst disingenuous.

There is nothing "limited," Opp. at 26, about the Nevada court's extraordinary ruling. It held that landowners have the unqualified right to exclude the public from up to 500 feet of navigable airspace above their land and that ordinances allowing airplanes to fly less than 500 feet over private land cause a taking of this right. Pet. App. 15a, 23a. There are hundreds if not thousands of properties around McCarran subject to ordinances that have the same "central purpose," Opp. at 26-27, of enabling planes to fly less than 500 feet above ground, and thus that effect a compensable "permanent physical invasion" of private airspace under the Nevada court's logic. Pet. App. 30a. The owners of every one of these properties can seek compensation for such invasions, which is why petitioners conservatively estimate their exposure at $10 billion.

To attack this estimate, respondent misquotes an outdated 2005 financial report. The statement that "resolution of these matters will not have a material adverse effect on the future financial condition of the Airport" appears in a paragraph describing litigation matters other than this lawsuit, which is described in an earlier paragraph.[3] Moreover, the 2005 report was prepared when the Nevada court had recently *rejected* the claim that the same ordinances at issue here effected a *per se* taking. See *County of Clark* v. *Hsu*, No. 38853 (Nev. Sept. 30, 2004). Bond indentures issued since the decision in this case confirm petitioners' representations to this Court. They list a number of pending takings suits and acknowledge "the possible effect of the *Sisolak* decision" in each; they note that, as a result of the decision, "it is possible other litigation will be filed based on a similar legal theory," see Reply App.; and

---

[3] Clark County Dep't of Aviation, *Comprehensive Annual Financial Report of the Year Ended June 2005*, at 51 n.9 (2005), *available at* http://cms.mccarran.com/dsweb/Get/Document-101847.

they do not conclude with the "reassur[ance]," Opp. at 27 n.14, that respondent misquotes from the earlier report. See Reply App.

Similarly, respondent speciously argues that this estimate is not supported by record citations. Opp. at 27. But petitioners had no opportunity or duty to submit such an estimate, because it was not relevant to the merits of respondent's takings claim; it is relevant to why this Court should review the decision. Moreover, precisely because there was no evidence on the subject, the Nevada court's "finding" that its decision will not harm the airport is utterly baseless. In fact, before the decision in this case, the state *repealed* the law permitting the property trading that the court thought would ameliorate the impact of its ruling.[4] Nor can petitioners' detailed showing of the significant operational impacts that that ruling will have on the nation's fifth busiest airport be shrugged off with the blithe observation that adverse takings decisions against two small municipal airports and an air force base did not lead to "calamitous results." *Id.* at 28. Indeed, any doubt about the impact of the decision in this case is laid to rest by the extraordinary *amicus* brief joined by every significant member of the otherwise fractious aviation industry. Like petitioners, these *amici* urge review because the decision in this case "[t]hreaten[s]" and "[i]mperils" the national aviation system. See Brief on Behalf of the Air Line Pilots Association, Int'l, *et al.* as *Amici Curiae* in Support of Petitioners at 7-8, 14-18.

2. Respondent does not even attempt to defend the Nevada court's deeply flawed holding that the ordinances effected a *per se* "*Loretto*-type" taking under federal law.[5] Instead, he

---

[4] *Compare* Nev. Rev. Stat. § 244.281(1)(c) (2004) (permitting counties to exchange property) *with id.* § 244.281(1) (2006) (exchange provision repealed).

[5] Respondent's suggestion that the Nevada court's takings test is "'*per se*' in name" only, Opp. at 26, is false. The court found "a permanent physical invasion of his airspace" based simply on "evidence that planes

claims that the court's "clear intent" to shield this decision from review defeats this Court's jurisdiction. Opp. at 16. Regardless of its intent, however, the court's award of $2 million in attorney's fees under the federal Uniform Act, 42 U.S.C. § 4654(c), necessarily rests on its ruling that the ordinances effected a taking under the Federal Constitution. There is thus no independent and adequate state law basis for the takings judgment in this case.[6]

As the state court recognized, Nevada law forbids the award of attorney's fees unless authorized by statute, rule or contract. Pet. App. 33a. And the court admitted that there is no basis in Nevada law for a fee award in respondent's circumstances: there is no constitutional right to fees, and the state eminent domain statute likewise does not so provide. *Id.* Instead, the court turned to the federal Uniform Act.

As petitioners have shown, and respondent nowhere disputes, the Uniform Act only permits fees for takings or other claims founded on the *Federal* Constitution or other federal law. Pet. 30. And, contrary to respondent's contention, Opp. at 17, there is no ambiguity about whether the Nevada statute that subjects state entities to the Uniform Act permits fees for takings under state, rather than federal, law.

The court below has definitively ruled that Nev. Rev. Stat. § 342.105 simply "adopt[s], by reference, the federal [Uniform] Act and its regulations." *City of Reno* v. *Reno Gazette-Journal*, 63 P.3d 1147, 1150 (Nev. 2003) (per curiam). The court relied on the state statute's legislative history in concluding that its purpose was to incorporate into Nevada law applicable federal law in its totality. *Id.* at 1149. Indeed, in

---

fly lower than 500 feet above his property." Pet. App. 23a. The court did not consider any of the factors that inform an ad hoc regulatory takings analysis; indeed, it held that respondent did not have to exhaust the variance procedure because he asserted a "per se taking." *Id.* at 21a.

[6] As noted above, respondent concedes that the preemption issue is legally distinct and not jursidictionally barred. *See* Opp. at 19-20.

Reno, the court held that, when a state agency is subject to the Uniform Act, state law that otherwise would govern is trumped by federal law. *Id.* at 1150.

It is thus indisputable that the fee award in this case rests entirely on the finding of a taking under the Federal Constitution. The state court only invoked the Nevada implementing statute to show that, because petitioners received federal funding, it was necessary for them to "'comply with [the Uniform Act's] *federal* requirements.'" Pet. App. 35a (quoting Nev. Rev. Stat. § 342.105(1)) (emphasis added). The court's entire discussion of the propriety of respondent's fee award dwelt upon the metes and bounds of the federal Uniform Act, not the Nevada statute. Thus, because the Uniform Act only permits attorney's fees in inverse condemnation actions arising under federal takings law, the court below necessarily based its ruling on the United States Constitution, and as such the decision is within this Court's jurisdiction.

The $2 million in fees awarded under federal law is hardly an "incidental" component of the ruling below. Opp. at 16. It amounts to nearly a third of the damage award itself. See Pet. App. 11a. Respondent's complaint that the issue of the Uniform Act's exclusive application to federal takings was never raised before the courts below, Opp. at 18, is both irrelevant and hypocritical. Petitioners do not seek *review* of this ruling, but rather cite it to show that the judgment rests on federal law. Respondent cannot seek $2 million in fees under the Uniform Act, then complain that his recovery "unfairly" subjects his victory to review in this Court.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant the petition.

Respectfully submitted,

DAVID J. J. ROGER
DISTRICT ATTORNEY
E. LEE THOMSON
DEPUTY DISTRICT ATTORNEY
500 South Grand Central Parkway
Fifth Floor
Las Vegas, Nevada 89109
(702) 455-4761

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PETER R. STEENLAND
PETER C. PFAFFENROTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

KIRK B. LENHARD
R. DOUGLAS KURDZIEL
SCOTT M. SCHOENWALD
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89109
(702) 862-3300

LORI POTTER
DANIEL S. REIMER
THOMAS R. DEVINE
ARTHUR P. BERG
KAPLAN KIRSCH &
ROCKWELL LLP
1675 Broadway,
Suite 2300
Denver, Colorado 80202
(303) 825-7000

Counsel for Petitioners

January 23, 2007

* Counsel of Record

APPENDIX

CLARK COUNTY DEPARTMENT OF AVIATION

CLARK COUNTY, NEVADA
AIRPORT SYSTEM SUBORDINATE
LIEN REVENUE BONDS
SERIES 2006A
(NON-AMT)

(Aug. 30, 2006)

* * * *

[45] LITIGATION AND OTHER LEGAL MATTERS AFFECTING THE AIRPORT

General Litigation. There is no controversy of any nature now pending against the County or, to the knowledge of its respective officers, threatened, seeking to restrain or enjoin the issuance, sale, execution or delivery of the Series 2006A Bonds or in any way contesting or affecting the validity of the Series 2006A Bonds or any proceedings of the County taken with respect to the issuance of, sale thereof, or the pledge or application of any monies or security provided for the payment of the Series 2006A Bonds or the use of the Bond proceeds.

Inverse Condemnation Litigation. The County is a party to actions concerning Airport System operations in which inverse condemnation damages and other damages are being sought against the County. Although the facts and circumstances of each case differ, the County believes the ultimate outcomes will all be affected by the recently decided Nevada Supreme Court case, *Steve Sisolak v. McCarran International Airport and Clark County*, Case No. A434337 described below. A discussion of the individual cases is below.

Steve Sisolak v. McCarran International Airport and Clark County, Case No. A434337 and Nevada Supreme Court Case

No. 41646. In *Sisolak*, the District Court found for plaintiff's inverse condemnation claim, holding that a per se taking had occurred as a result of the County's enactment of airport height zoning [46] ordinances. As of July 31, 2006, the estimated amount of the Court award (including interest and attorney's fees) was $20,252,000, including interest, costs and attorneys' fees. On appeal, the Nevada Supreme Court on July 13, 2006 affirmed the District Court's ruling that a per se taking had occurred as a result of the County's airport height zoning ordinance. The County is exploring a writ of certiorari to the U.S. Supreme Court based on federal law, including federal aviation law. The outcome of this request is difficult for the County to predict, but if the petition to the U.S. Supreme Court is denied, the damages awarded by the District Court would have to be paid.

Tien Fu Hsu and Lisa Su Family Trust; S.W. Stephen Huang, Peter B. Liao, Lucky Land Company Enterprise, Westgate, West Park, Inc., v. Clark County, Case No. A434071. The plaintiffs alleged inverse condemnation as a result of the Airport's expansion due to increased aircraft operations and the resultant noise, dust, vibration and fumes. The amount of damages claimed is unknown but in a previous case against the County, the plaintiffs were awarded $13 million for inverse condemnation of the same properties allegedly due to zoning height restrictions. While this prior award was overturned by the Nevada Supreme Court, in an unpublished decision, the *Sisolak* decision calls into question the rational of the prior unpublished decision in Hsu. The Nevada Supreme Court remanded the case to district court to give the plaintiffs the opportunity to apply for a zoning variance. Thereafter, plaintiffs did not apply for a variance because they sold the property. As a result, the district court dismissed the case. Plaintiffs have appealed. Despite the *Sisolak* decision, the County believes it has strong defenses in this case, but the ultimate outcome is difficult to predict.

Vacation Village, Inc., v. Clark County ex rel Clark County Department of Aviation (Formerly Case No. A328480), Bankruptcy Court Case No. BK-S-97-27654 RCJ, Chapter 11, ADV-S-982313 RCJ. The plaintiff, Vacation Village, filed an inverse condemnation action against the Department in December 1993 seeking approximately $17 million in compensation. The Bankruptcy Court issued findings of fact and conclusions of law that the low and frequent flight of aircraft over the plaintiff's property caused a direct, substantial and immediate interference with the enjoyment and use of the plaintiff's property, demonstrated by a significant and immediate decline in market price. The Bankruptcy Court's award to plaintiff (made June 17, 2005 and amended July 7, 2005), plus interest, costs and attorney's fees as of July 30, 2006, is approximately $10,541,000. The County believes the Bankruptcy Court did not have the factual or legal basis to support its decision and has appealed. While the County believes there is a strong basis for overturning the decision, the outcome of any appeal and the amount of damages ultimately awarded is difficult for the County to predict.

Hotels Nevada, LLC v. Clark County District of Nevada, Case No. A405698. This case involves the alleged "per se taking" of the plaintiff's airspace. On or about August 9, 2001, the parties argued crossmotions for summary judgment. The Court denied all motions and the landowners' subsequent Motion for Clarification. It is impossible to predict the outcome of this case at this juncture given the current stage of the present litigation and the possible effect of the *Sisolak* decision. The County believes there are significant viable defenses available.

Mickle v. Clark County District of Nevada, Case No. A442655. Plaintiffs have alleged that the County and the Airport have dramatically increased airplane and helicopter operations causing increased noise, dust, fumes, smoke, and vibrations over and upon their property. Plaintiffs further allege that the County has condemned, purchased, removed

and/or demolished properties in the neighborhood of plaintiffs' residence, thereby blighting plaintiffs' neighborhood such that they can no longer use their property to its highest and best use. The County believes there is a strong potential to prevail on several affirmative defenses, including plaintiffs' knowledge of the Airport's future expansion.

McCarran Plaza Suites, Inc. v. McCarran International Airport and Clark County, a political subdivision of the State of Nevada, Case No. A444497. McCarran Plaza Suites, Inc. ("MPS") filed its Complaint for Damages by Inverse Condemnation against the Airport and the County on January 2, 2002. MPS recently emerged from a Chapter 11 bankruptcy proceeding, and the Bankruptcy Court has transferred control of MPS to its original owner. The trustee in the MPS bankruptcy sold the subject property at auction in 2000, and the County has since acquired it from the purchaser. MPS alleges that the County's imposition of [47] height restrictions on buildings on the subject property, and the impact of noise from airport operations, reduced the market value of the subject property at the time of its auction and constituted a "taking." Although MPS has not yet placed a dollar value on its damages, the County believes MPS will seek damages in the multi-million dollar range. The County has denied that a "taking" occurred and believes it has a number of meritorious defenses to MPS's claims. The County has contested the case vigorously, and will continue to do so. It is impossible to predict the outcome of this case at this juncture given the current stage of the litigation and the possible effect of the *Sisolak* decision.

Mohler Trust v. Clark County, District of Nevada, Case No. A463007. The complaint for inverse condemnation for the alleged per se taking of airspace above the plaintiff's property was filed on February 6, 2003. At this juncture, it is impossible for the County to predict the likelihood of a successful defense. The County believes there is a strong potential to prevail on several affirmative defenses given the current stage

of the litigation and the possible effect of the *Sisolak* decision. The likelihood of appeal by both parties is very high, regardless of the outcome.

Boueri v. McCarran International Airport and Clark County, Case No. A502726. The plaintiff filed an inverse condemnation complaint on April 19, 2005, alleging that the expansion and modification of runways and the imposition of zoning height restrictions over the plaintiff's property constitute a "per se taking." Discovery has not yet commenced and the amount claimed is uncertain, but believed to be in the lower range of the inverse condemnation cases that the County is defending. It is impossible to predict the outcome of this case at this juncture given the current stage of the litigation and the possible effect of the *Sisolak* decision.

STT Land, LLC and Doe Landowners I-XX v. McCarran International Airport and Clark County, Case No. A524064. The plaintiffs filed an inverse condemnation complaint on June 28, 2006 alleging the imposition of zoning height restrictions over the plaintiff's property constitute a "per se taking." Discovery has not commenced and the amount claimed is uncertain. It is impossible to predict the outcome of this case at this juncture given the current stage of the present litigation and the possible effect of the *Sisolak* decision.

MBP Land, LLC and Doe Landowners I-XX v. McCarran International Airport and Clark County, Case No. A524065. The plaintiffs filed an inverse condemnation complaint on June 28, 2006 alleging the imposition of zoning height restrictions over the plaintiff's property constitute a "per se taking." Discovery has not commenced and the amount claimed is uncertain. It is impossible to predict the outcome of this case at this juncture given the current stage of the present litigation and the possible effect of the *Sisolak* decision.

Other possible inverse condemnation/taking litigation. As a result of the Sisolak decision, it is possible that other litigation will be filed based on a similar legal theory by landown-

ers who are affected by the County's airport height zoning ordinance. It is impossible to predict at this time whether any such litigation will be filed or its ultimate outcome.

Other Litigation. *Vacation Village, Inc., et al. v. Clark County and Nevada Department of Transportation*, Case No. A441267. The plaintiff, Vacation Village, filed a Complaint on October 16, 2001 seeking, among other things, damages for a claimed taking of an alleged reversionary right to property which the Nevada Department of Transportation conveyed to the County. The Complaint was dismissed for failure to state a claim. However, plaintiff, Vacation Village, and an intervening plaintiff, VVLV, LLC, who had subsequently purchased the Vacation Village Hotel property, were allowed to file an Amended Complaint, provided they made no claim for reversionary rights. A settlement agreement has been reached with the successor in interest to the intervening plaintiff, VVLV, LLV. The new claim in the Third Amended Complaint filed by Vacation Village on April 22, 2004 includes eight causes of action based upon reversionary rights, a taking of reversionary rights and rights of first refusal, inverse condemnation, unjust enrichment, intentional interference with prospective economic advantage, taking of airspace, misrepresentation and concealment and civil conspiracy. The County does not know the amount of damages the plaintiff will claim, [48] but believes claimed damages will exceed $500,000. The County believes the case has no merit. There is a pending motion asking the Court to dismiss the remainder of the case.

The County is a party to numerous other actions and claims in connection with the ownership and operation of the Airport System, including personal injury claims, employment related claims and construction claims, but in the opinion of the District Attorney, the actions and claims described in this paragraph are not expected, in the aggregate, to have a material adverse effect on the financial condition of the Airport System.

(2)

No. 06-658

FILED
JAN 12 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

McCARRAN INTERNATIONAL AIRPORT AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioners

v.

STEVE SISOLAK

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF ON BEHALF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.; THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION; THE AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA; THE NATIONAL BUSINESS AVIATION ASSOCIATION, INC.; AND THE REGIONAL AIRLINE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JONATHAN A. COHEN
JAMES W. JOHNSON
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
535 Herndon Parkway
Herndon, VA 20170
(703) 689-4323

Counsel for amicus curiae Air Line Pilots Association, International

BETH S. BRINKMANN
Counsel of Record
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 887-1544

JOSEPH M. QUINN III
MARA E. ROSALES
MEYERS NAVE
555 12th St.
Suite 1500
Oakland, CA 94607

Counsel for amicus curiae Airports Council International-North America

JANUARY 12, 2007

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

THOMAS RICHICHI
GUS B. BAUMAN
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6000

DAVID A. BERG
KATHERINE ANDRUS
AIR TRANSPORT ASSOCIATION
OF AMERICA, INC.
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, DC 20004

Counsel for amicus curiae
Air Transport Association
of America, Inc.

JOHN S. YODICE
AIRCRAFT OWNERS AND
PILOTS ASSOCIATION
601 Pennsylvania Ave., N.W.
Suite 875
Washington, DC 20004

Counsel for amicus curiae
Aircraft Owners and
Pilots Association

PATRICIA A. HAHN
AIRPORTS COUNCIL
INTERNATIONAL-NORTH AMERICA
1775 K St., N.W.
Washington, DC 20006

Counsel for amicus curiae
Airports Council
International-North America

J.E. MURDOCK III
NATIONAL BUSINESS
AVIATION ASSOCIATION
1200 Eighteenth St., N.W.
Suite 400
Washington, DC 20036

Counsel for amicus curiae
National Business
Aviation Association, Inc.

R. BRUCE KEINER, JR.
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004

Counsel for amicus curiae
Regional Airline Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

This Court's Review Is Necessary Because The Nevada Court's Ruling Is Contrary To The Longstanding Federal Legal Standard Governing Airspace That Is Critical To Safe Takeoffs And Landings Throughout The National Aviation System 6

I. The Finding Of A *Per Se* Taking In This Case Was Wrong And, If Left Unreviewed, Will Threaten The National Aviation System Without Regard To Well-Established Federal, Local, And Private Interests 7

A. Respondent's Property Is Not Physically Invaded And Retains Substantial Economic Use And Value, Which Makes A *Per Se* Taking Analysis Inapplicable 8

B. The Ruling Of A *Per Se* Taking Is Error Because It Is Contrary To Longstanding Federal Law And Policy On Which The Land Regulation Was Based And *Amici* Have Relied 9

C. The *Per Se* Taking Ruling Imperils the National Aviation System And Undermines The Predictability And Reliability Of That System On Which Both Commerce And Individual Passengers Rely 14

TABLE OF CONTENTS – Continued

Page

II. The *Penn Central* Analysis Applies To Safety-Based Height Limitations Near Runways Because It Takes Into Account The Reasonable Investment-Backed Expectations Of The Landowner And The Character Of The Regulation Of Airspace 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 20

Griggs v. Allegheny County, 369 U.S. 84 (1962) 8

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 19

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 9

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 5, 18, 19

Suburban O'Hare Commission v. Dole, 787 F.2d 186 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986) 18

United States v. Causby, 328 U.S. 256 (1946) 8

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 8

STATUTES AND REGULATIONS:

49 U.S.C. § 40101(a)(3) 10

49 U.S.C. § 40101(a)(14) 10

49 U.S.C. § 40102(a)(32) 10

49 U.S.C. § 40103(a)(2) 10

49 U.S.C. § 47101(a)(1) 10

49 U.S.C. § 47101(a)(7) 10

49 U.S.C. § 47101(a)(8) 10

49 U.S.C. § 47107(a)(10) 11

49 U.S.C. § 47502(3) 12

49 U.S.C. § 47503 12

TABLE OF AUTHORITIES – Continued

Page

Civil Aeronautics Act of 1938, Pub. L. 75-706, 52 Stat. 973 (1938) 9

14 C.F.R.:
Pt. 77 11
§ 77.13 12
§ 77.31-.39 12
§ 91.119(c) 4, 10, 13
Pt. 150 12
§ 150.21 12

MISCELLANEOUS:

FAA, *Advisory Circular: Noise Control and Compatibility Planning for Airports*, A/C 150/5020-1 (1983) 12

FAA, *Advisory Circular: Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, A/C 70/7460-2K (2000) 4, 13

David Hasemyer, *Is Office Tower's Height A Hazard?*, The San Diego Union-Tribune, Nov. 5, 2006 16

Elsa Brenner, *Many Private Planes To Store, But Not Enough Hangars*, The N.Y. Times, Dec. 27, 2006 19

Richard N. Velotta, *Airport Land Use: Lawsuits Could Prompt Cuts At Las Vegas Airport*, The Las Vegas Sun, May 28, 2003 15

BRIEF ON BEHALF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.; THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION; THE AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA; THE NATIONAL BUSINESS AVIATION ASSOCIATION, INC.; AND THE REGIONAL AIRLINE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Air Line Pilots Association, International, the Air Transport Association of America, Inc., the Aircraft Owners and Pilots Association, the Airports Council International-North America; the National Business Aviation Association, Inc., and the Regional Airline Association respectfully submit this brief as *amici curiae* in support of petitioners.

INTERESTS OF *AMICI CURIAE*[1]

The various *amici* and their members have a vital interest in protection of the public's right to transit navigable airspace in a manner that ensures public safety and security. If allowed to stand, the Nevada Supreme Court decision in this case, and its errant legal analysis, will have a significant adverse impact on the airports of the United States and the interests of the national and regional airlines, the aircraft owners, and the pilots, whose daily use of those airports is central to the nation's economy and to the travel needs of tens of millions of Americans.

The Air Line Pilots Association, International (ALPA) is a labor union that represents 61,000 professional airline pilots at 40 air carriers in the United States and Canada. ALPA's members operate at all air carrier airports in the

---

[1] Letters from petitioners and respondent providing written consent to the filing of this brief are being filed with the Clerk of this Court along with this brief, in accordance with Rule 37.3. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

United States including McCarran International Airport. ALPA's motto is "schedule with safety" and ALPA is recognized in the airline industry for its contributions to flight safety.

The Air Transport Association of America, Inc. (ATA) is the principal trade and service organization of the major scheduled air carriers in the United States. ATA's members annually serve approximately 600 million passengers and transport millions of tons of air cargo in the National Aviation System, including most of the visitors and cargo entering McCarran International Airport in Las Vegas, Nevada. ATA members provide vital air services on which the traveling public and business community have come to rely.

The Aircraft Owners and Pilots Association (AOPA) is a nationwide membership association of more than 400,000 individual pilots and aircraft owners. AOPA members fly and own most of the civil aircraft fleet of the United States ranging from light sport aircraft to large turbojet aircraft. This segment of aviation is commonly known as "general aviation." In terms of hours flown, general aviation accounts for more than half of civil flying in the National Aviation System. General aviation utilizes McCarran International Airport and all other civilian airports in the country.

The Airports Council International-North America (ACI-NA) is a trade association representing the state, regional and local government bodies, including Clark County, Nevada, that own and operate the principal airports served by scheduled air carriers in the United States and Canada. The 135 ACI-NA member airports in the United States handle approximately 95 percent of the domestic and international air passenger traffic in the United States.

The National Business Aviation Association, Inc. (NBAA) is a membership association of more than 8,000 members who operate aircraft for business purposes within the United States and internationally. NBAA members operate about 9,000 aircraft ranging from single piston engine to complex, high performance aircraft to and from the approximately 5,000 public airports in the United

States. NBAA members use McCarran International Airport on a daily basis and the association has held its annual meeting and convention in that city using the airport as a place to display aircraft.

The Regional Airline Association (RAA) represents short-haul scheduled airlines providing service primarily between small- and medium-sized communities and the nation's hub airports. RAA's 43 member airlines serve 99 percent of the airports in the United States with scheduled commercial service, including McCarran International Airport, and transport 97 percent of the passengers carried by regional airlines.

SUMMARY OF ARGUMENT

The holding by the Nevada Supreme Court that a local restriction on building height, which still would have permitted at least a four-story hotel and casino to be built on the relevant land parcel, was a *per se* taking of property requiring millions of dollars in compensation is wrong. If left uncorrected, that ruling will threaten our National Aviation System, *i.e.,* the complex and interdependent nationwide network of airports and airways, on which the *amici*, the nation's businesses, large and small, and the traveling public rely. This Court's review is necessary because the Nevada court's ruling contradicts this Court's established takings jurisprudence, as well as the federal law and policy governing airspace that is critical to safe takeoffs and landings throughout that National Aviation System. *Amici*, who represent every segment of the air transportation industry, have come together in this unprecedented expression of common purpose to urge review by this Court to avoid such adverse consequences.

I.

A. The Nevada Supreme Court's ruling creates a huge degree of uncertainty for the air transportation industry and local governments that seek the benefits of air commerce for their communities. The county ordinances at

issue restricted certain, but not all, construction on respondent's land. Respondent's property is not physically invaded and retains substantial economic use and value, which makes a *per se* taking analysis inapplicable. The court's contrary ruling on this issue, however, engenders confusion and possible efforts to impose such analysis elsewhere in similar instances.

B. Ownership of navigable airspace over privately-held property is subject to the public right of transit through that airspace. This well-settled legal view undergirds the substantial investments in, and development of, our nation's airports, their runways, and the airlines and private aircraft operators who use them. It has produced the safest, most efficient, and most productive engine of air commerce and travel in the world.

Current federal law defines navigable airspace in uncongested areas as all airspace above 500 feet above ground level (AGL) and airspace below 500 feet AGL that is necessary for safe takeoff and landing. 14 C.F.R. § 91.119(c). Whether nonaviation usage of airspace below 500 feet AGL can be accommodated without a decrease in the safety and capacity for takeoffs and landings must be determined on a case-by-case basis. In most instances, if the FAA determines that proposed construction may pose a safety concern, local land use authorities look to that determination to ascertain the extent of use that is consistent with public safety and welfare. The interested parties then negotiate a solution that best meets the needs of the various interests at stake. *See* FAA, *Advisory Circular: Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, A/C 70/7460-2K at 6 (2000).

The court below did not correctly construe this federal law or policy. The court treated the airspace below 500 AGL as if the federal scheme placed that airspace exclusively in private hands, regardless of whether such airspace is necessary for safe takeoff and landing. This interpretation reads out of federal law the qualifying language regarding lower airspace necessary for safe

takeoff and landing. The ruling dramatically changes the legal landscape for every *amicus*.

C. Where airports may be liable, or are uncertain about the risk of liability, for a *per se* taking based on *any* building restriction, no matter how reasonable, they are likely to delay or cancel airport improvements and capacity enhancements. When such airports do not operate at, or near, capacity because of fear of takings liability, neighboring airport operators may not be able to keep up with regional demand. The creation of such uncertainty in the capacity and development of our National Aviation System will have direct and indirect adverse effects on commerce and the traveling public.

II.

The three-factor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), is the appropriate analysis to determine whether petitioners' safety-based height limitations near runways constituted a taking. Unlike the *per se* taking analysis adopted by the Nevada Supreme Court, the *Penn Central* analysis allows a court to determine whether petitioners struck an appropriate balance between accommodation of nonaviation usage of navigable airspace and prevention of such usage if it would decrease the safety and capacity of the airspace and airport system.

A. Petitioners' height restriction did not interfere with respondent's reasonable investment-backed expectations. McCarran International Airport is typical of many airports where local authorities built the airport far away from substantial development, but development grew around the airport. In such circumstances, the landowners have no reasonable expectation of developing their property without regard for the operations of the airport, especially when the landowners benefited from the airport's development in the first place.

B. Regulation of building height near airport runways to eliminate obstructions to safe navigation of the public airspace does not possess the character of a taking. Height restrictions impose a limited economic burden that

promotes the common good by safeguarding the life and property of both those who travel in aircraft and those who occupy the buildings below.

Height restrictions that reflect federal criteria also promote the common good because they support a national standard. Such a system of cooperative federalism cannot function if courts and juries are able to impose massive fiscal liability, as in the instant case, on state or local entities that seek to comply with the views of the FAA. The risk of such massive liability would discourage thousands of state and local entities that have zoning authority near airports from adoption or enforcement of land use standards that protect the safe and efficient operation of the national air transportation system.

ARGUMENT

This Court's Review Is Necessary Because The Nevada Court's Ruling Is Contrary To The Longstanding Federal Legal Standard Governing Airspace That Is Critical To Safe Takeoffs And Landings Throughout The National Aviation System

Amici represent every segment of the air transportation industry – airport owners, pilots, commercial airlines, regional air carriers, business aircraft owners, and private aircraft owners. These entities often have divergent interests, but have come together in this unprecedented expression of common purpose to urge review by this Court. They do so because the decision below is wrong and, if left unreviewed, would threaten the integrity of the National Aviation System, *i.e.*, our complex and interdependent nationwide network of airports and airways, on which the *amici*, the nation's businesses, large and small, and the traveling public rely. The ruling below jeopardizes the right of public transit through the nation's navigable airspace. This right of public transit is a vital element underlying the comprehensive system of judicial rulings, legislative enactments, and agency rulemakings

that, together, have brought certainty, safety, and growth to our national network of airports and to our economy.

I. The Finding Of A *Per Se* Taking In This Case Was Wrong And, If Left Unreviewed, Will Threaten The National Aviation System Without Regard To Well-Established Federal, Local, And Private Interests

The Nevada Supreme Court's ruling creates a huge degree of uncertainty for the air transportation industry and local governments who seek the benefits of air commerce for their communities. It gives a single landowner, who knowingly purchased land near a major airport runway and whose land retains significant economic use and value, the ability to extract an exorbitant sum of money from a publicly-owned airport merely because possible future construction on his land was limited by a county height regulation to ensure the safe operation of aircraft to and from McCarran International Airport. The ruling below appears to open the door to comparable demands by other landowners seeking the same windfall.

The uncertainty created by the decision below is likely to affect adversely continuing efforts to enhance safety and flight capacity. If airports are now foreclosed from adopting reasonable zoning restrictions and instead are required to purchase all airspace necessary to ensure access to the National Aviation System, those expenditures would substantially reduce the funds available for airport improvements that enhance safety and flight capacity. The ruling will also have a chilling effect on the adoption of future regulations designed to protect airports from encroachments that could jeopardize safety and constrain capacity.

The impact will not be limited to Nevada. Any airplane passenger whose coast-to-coast travel has been disrupted due to inclement weather in Chicago or Denver knows full well the interdependent nature of our National Aviation System. Moreover, the ruling casts a long shadow, which likely will affect investment, over the development

plans and operations of other airports and of communities in other States who want such airports.

A. Respondent's Property Is Not Physically Invaded And Retains Substantial Economic Use And Value, Which Makes A *Per Se* Taking Analysis Inapplicable

The challenged county ordinances do not result in any physical occupation of respondent's land. They impose only a limit, subject to variance, on the height of structures that can be built on the property. As this Court explained 80 years ago in its seminal decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), there is "no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits."

The continuing economic use and value of the land, and the myriad commercial uses for which it remains available, fatally undermines the lower court's determination that petitioners' actions constituted a *per se* taking. Authorization for a variance had, in fact, been granted for the construction of a four-story, 66-foot high, 600-room resort hotel and casino on the land, but that alternative was not pursued. Pet. App. 5a-6a. Respondent sought no additional variances and did nothing to work with petitioners toward an agreement that would have met all the relevant interests at stake. Instead, he filed this suit claiming a *per se* taking and sought millions of dollars in compensation.

In *United States v. Causby*, 328 U.S. 256 (1946), and *Griggs v. Allegheny County*, 369 U.S. 84 (1962), this Court adopted the general rule that "[f]lights over private land are not a taking." 328 U.S. at 266. The Court noted that a taking may occur where flights are "so low and so frequent" that they render the subject property uninhabitable or destroy existing businesses on the property, but respondent did not prevail on such a claim here. In fact, respondent stipulated to the dismissal of the portion of his complaint that alleged that his property was affected in this way by the flights.

Pet. App. 9a. Thus, these cases cannot support the Nevada court's ruling.

B. The Ruling Of A *Per Se* Taking Is Error Because It Is Contrary To Longstanding Federal Law And Policy On Which The Land Regulation Was Based And *Amici* Have Relied

Ownership of navigable airspace over privately-held property is subject to the public right of transit through that airspace. It has long been recognized that individuals do not possess the unilateral right to exclude others from navigable airspace over their property. In the Civil Aeronautics Act of 1938, 75 Pub. L. No. 75-706, 52 Stat. 973 (1938), Congress declared "a public right of freedom of transit in air commerce through the navigable air space of the United States." Justice Jackson succinctly observed that "the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

This well-settled legal view undergirds the substantial investments in, and development of, our nation's airports, their runways, and the airlines and private aircraft operators who use them. It has produced the safest, most efficient, and most productive engine of air commerce and travel in the world. The ruling below, by contrast, imposes a huge financial burden of potentially billions of dollars on one of the nation's major airports, a burden which could not have been foreseen under the legal standard that governed during its creation, development, and expansion. That substantial burden, itself, will have a significant impact on the National Aviation System because of its adverse consequences for the economic vitality of McCarran International Airport, for the future development and

expansion of runways and airports throughout Nevada, and for the ripple effect it will have around the nation.

1. Congress has established a right to public travel through navigable airspace based on its recognition that safe travel through navigable airspace furthers both the national interest and the public welfare of communities served by air travel. 49 U.S.C. § 40103(a)(2). First, Congress has provided that it is the policy of the United States "that the safe operation of the airport and airway system is the highest aviation priority," 49 U.S.C. § 47101(a)(1), and has charged the Federal Aviation Administration (FAA) with responsibility to "maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public." *Id.* § 40101(a)(3). Second, Congress has called for "promoting, encouraging and developing civil aeronautics and a viable, privately-owned United States air transport industry," *id.* § 40101(a)(14), in large part through encouragement of airport proprietors to undertake improvements that increase capacity, safety and efficiency. *See id.* § 47101(a)(7). Finally, Congress has stated that it is the policy of the United States "to ensure that nonaviation usage of the navigable airspace *be accommodated but not allowed to decrease the safety and capacity of the airspace and airport system.*" *Id.* § 47101(a)(8) (emphasis added).

Before the ruling in this case, all those involved in the air transportation industry, *i.e.*, the users of the National Aviation System represented by *amici,* the FAA, and virtually all landowners adjacent to our nation's airports, shared a common legal view that the airspace below 500 feet above ground level (AGL) in uncongested areas that was necessary for the safe takeoff and landing of airplanes was open to the flying public and could be regulated to prevent future uses that would create a hazard to air navigation. Indeed, current federal law defines navigable airspace in this manner. *See* 49 U.S.C. § 40102(a)(32); 14 C.F.R. § 91.119 (qualifying the regulation of minimum safe altitudes to allow lower flight "when necessary for takeoff or landing").

Whether nonaviation usage of airspace below 500 feet AGL can be accommodated without a decrease in the safety and capacity for takeoffs and landings in the National Aviation System is context-specific and must be made on a case-by-case basis. *See generally* 14 C.F.R. Pt. 77. In addition to the most obvious concern that airplanes must be able to avoid collision with buildings on takeoff and landing, the existence of such structures can create visual hazards, such as lighting or glare that make it difficult for pilots to see the landing approach. Similarly, tall buildings can cause radio signal interference with an airplane's navigational equipment or an air traffic controller's radar.

2. The FAA implements the federal laws and policy described above in conjunction with state and local governments through a program of cooperative federalism. The FAA is the regulatory authority in the United States charged with ultimate responsibility for the movement of aircraft both on the ground and in the air. The FAA, however, generally leaves to local governments the responsibility to ensure that land use and zoning ordinances are in place to protect the National Aviation System.

Although the FAA does not establish or operate airports, it provides significant federal funding to build, maintain, and expand airport facilities through Airport Improvement Program grants from the Aviation Trust Fund. In doing so, the FAA relies upon the certification from a grant recipient that that recipient has taken appropriate action to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations. 49 U.S.C. § 47107(a)(10). Petitioners have made that certification to the FAA repeatedly over time with regard to their operation of McCarran International Airport in Las Vegas and, in return, have received $155 million from the federal government over the past ten years to allow that airport to better serve the traveling public. Pet. 18.

One example of how the system operates in a manner that accommodates divergent interests is with regard to

matters of noise. At the direction of Congress, the FAA, after consultation with the Environmental Protection Agency and other appropriate agencies, has developed standards for noise levels that have been determined to be incompatible with certain kinds (*e.g.*, residential) of land use. 49 U.S.C. § 47502(3); 14 C.F.R. Pt. 150. With the FAA's support and following FAA's guidance and methodology, airport operators may prepare community maps of aircraft noise exposure identifying the areas of incompatible uses, based on the federal standards. 49 U.S.C. § 47503; 14 C.F.R. § 150.21. These maps in turn may be used by land use authorities as the basis for zoning or other land use requirements intended to prevent development in these areas of new incompatible uses. *See* FAA, *Advisory Circular: Noise Control and Compatibility Planning for Airports*, A/C 150/5020-1 at 8 (1983).

Before the decision below, a similar system was in place for concerns about airplane safety. To ensure uniform determinations regarding safe nonaviation use of navigable airspace, the FAA has developed advisory procedures for airports and landowners. The FAA requires that it be notified when anyone proposes to build or alter specified structures near an airport, 14 C.F.R. § 77.13, and the FAA then conducts aeronautical studies to determine whether the structure would constitute an actual hazard to aviation.[2]

---

[2] The FAA will find that development is a hazard only if the aeronautical study results in a finding that the adverse impact on the safe and efficient use of the airspace, facilities, or equipment is substantial. In conducting the study, the FAA is required to consider factors relevant to the efficient and effective use of the navigable airspace, including: (A) the impact on arrival, departure, and en route procedures for aircraft operating under visual flight rules; (B) the impact on arrival, departure, and en route procedures for aircraft operating under instrument flight rules; (C) the impact on existing public-use airports and aeronautical facilities; (D) the impact on planned public-use airports and aeronautical facilities; and, (E) the cumulative impact of the proposed construction or alteration of a structure when combined with the impact of other existing or proposed structures. 14 C.F.R. §§ 77.31-.39

In most instances, if the FAA determines that proposed construction may pose a safety concern, local land use authorities look to that determination to ascertain the extent of use that is consistent with public safety and welfare, and the interested parties are able to work out a solution that best meets the needs of the various interests at stake. The FAA thus "negotiate[s] with the proponent [of the construction] during the study process to resolve any adverse effect(s) on aeronautical operations." FAA, *Advisory Circular: Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, A/C 70/7460-2K at 6 (March 1, 2000). The FAA specifically explains that "[m]any times, a minor reduction in height and/or relocation of a proposed structure will eliminate or sufficiently minimize adverse aeronautical effects that would permit the issuance of a Determination of No Hazard to Air Navigation." *Ibid.*

3. The court below did not correctly construe this federal law or policy. The court treated the airspace below 500 AGL as if the federal scheme placed that airspace exclusively in private hands, regardless of whether such space is necessary for safe takeoff or landing. The court incorrectly reasoned by negative inference that, if airspace *above* minimum altitudes (by regulation, 500 feet in uncongested areas, 14 C.F.R. § 91.119(c)) is necessarily in the public domain, ownership of airspace *below* that level must rest with the private landowner, immune from any reasonable limits on use. This interpretation reads out of the regulation and statute the qualifying language regarding airspace that is necessary for safe takeoff and landing.

The ruling dramatically changes the legal landscape for every *amicus*, including airports, air carriers and their customers, other commercial and private aircraft operators, as well as all other users of the National Aviation System. That System cannot function if courts and juries are able to impose massive fiscal liability on state and local entities who seek to comply with the views of the expert federal agency. The mere prospect of such liability would discourage tens of thousands of relevant

state, regional, and local entities from fulfillment of their role in this interrelated system.

C. The *Per Se* Taking Ruling Imperils the National Aviation System And Undermines The Predictability And Reliability Of That System On Which Both Commerce And Individual Passengers Rely

1. *Amici*'s members are greatly concerned about the consequences of the flawed ruling below. Aircraft travel takes place within a highly regulated, closely monitored, and intricately complex air transportation system. The ruling below will foster the development of a patchwork of state rules, in Nevada and likely beyond, regarding whether airspace can be transited without a monetary payment.

Owners of land near airports will become toll collectors with power to shut down or seriously limit community access to the National Aviation System, regardless of the substantial public benefit that results from the challenged safety restrictions. Airport operators necessarily will engage in a different calculus when faced with a hazard determination from the FAA, depending on the legal rules in their State. Rather than work out an approach that reasonably accommodates all relevant interests, airport operators in States that follow Nevada's reasoning will have to assess the likelihood of potential takings liability in a wholly different manner from those in States that continue to recognize the legitimate use of zoning authority to prevent construction of airport hazards.

2. There are not enough resources available to local governments to respond to every potential claim and to pay the owner of every parcel of land that might be affected by the legal analysis of the court below. As demonstrated by petitioners in the *certiorari* petition, a *per se* taking approach to safety-based height restrictions will add billions of dollars to the operation costs of many airports. For example, with regard to McCarran International Airport alone, respondent has been awarded $6.5 million in compensation and more than $10 million in interest, fees,

and costs, for an inability to erect a building that is taller than 66 feet. Six other property owners had similar claims pending against McCarran International Airport in state court during the pendency of this litigation.

The size of this windfall award is likely to generate additional claims against petitioners. *See* Richard N. Velotta, *Airport Land Use: Lawsuits Could Prompt Cuts At Las Vegas Airport*, The Las Vegas Sun, May 28, 2003 (noting that "there are 3,554 acres within a 20,000-foot radius of [McCarran] airport boundaries that have zoning similar to that of the land on which damages were awarded"). Indeed, two more cases against McCarran International Airport were filed virtually contemporaneously with the Nevada Supreme Court's opinion. Moreover, the Nevada court's novel holding, purportedly relying as it does on this Court's takings precedent, serves up a compelling financial incentive for a flood of follow-on demands by would-be litigants to compensate for a taking of "their" airspace within a mile or two or more of every airport in the country where zoning height restrictions have been adopted in the interest of safety.

Airport operators in States where compensation is required for any height restriction below 500 feet AGL may be unable to maintain or expand existing airports or to build new airports. If petitioners must spend at least $10 billion to keep McCarran International Airport operating in its current manner, petitioner Clark County will not have the funds to develop a second regional airport that is needed to meet consumer demands. *See* Pet. 16-17. Furthermore, where airports may be liable, or are uncertain about the risk of liability, for a *per se* taking based on *any* building restriction, no matter how reasonable, they are likely to delay or cancel needed airport improvements and capacity enhancements.

3. When airports are not operating at, or near, capacity due to fear of *per se* takings liability, airport operators in neighboring States, in turn, may not be able to keep up with regional demand. Airline investment in routes that serve these airports and in larger aircraft to serve those routes may be lost due to uncertainty about

the airport's continuing ability to accommodate landing and takeoff requirements. Concern about increased landing fees and related charges associated with the payment of claims or the purchase of airspace rights will likely adversely affect airline decisions to provide new or additional service to airports.

Unconstrained construction adjacent to airports can have other direct, adverse effects on airport capacity as well. For example, new structures may present safety issues because they would require aircraft to climb more rapidly on departure. The only way to achieve safe clearance of those new structures may be to lower aircraft takeoff weight by either reduction of the number of passengers and cargo, or by restriction on the amount of fuel the aircraft carries, thereby reducing the aircraft's range of flight.

Even when a building does not interfere with the most common landing path used by airplanes, the safety of air travel can be implicated when a building extends into a landing path that planes are supposed to use in bad weather or under other unusual circumstances. *See* David Hasemyer, *Is Office Tower's Height A Hazard?,* The San Diego Union-Tribune, Nov. 5, 2006. If other landowners also build around the airport, the airlines would be forced constantly to develop new emergency procedures to avoid the increasing number of obstacles.

4. The adverse impact extends far beyond airports in large Nevada cities, such as Las Vegas and Reno. There are 52 airports open to the public in Nevada. Forty-seven of them are publicly owned (the balance are privately owned but open to the public), and 31 are in the FAA's National Plan of Integrated Airport Systems and have received and are eligible to receive considerable federal airport aid devoted to development and maintenance of a national system of airports. These smaller Nevada airports are critical to retention of vital industries within the communities served by those airports. These modest, but effective, airport facilities provide essential air travel between otherwise remote places and centers of commerce.

These airports, for the most part, were never designed, however, to ensure that small aircraft (*e.g.*, the Cessnas, Pipers, and Beechcrafts) using these fields would be able to reach 500 feet altitude before leaving the airport's boundaries and flying over adjacent lands. Nevertheless, the Nevada Supreme Court ruling would appear to render reasonable height regulations at such smaller airports untenable as well.

The lower court's holding appears to be wholly unworkable for the nation's smaller privately-owned airports. These private airports, which lack zoning authority, would be required under the decision below to purchase air rights (even where there is no evidence that air traffic affects the landowners' use of the land). Indeed, air traffic in the area could face paralysis if one landowner refuses to sell an easement. Many such airports would be forced to cease operation, further compromising the National Aviation System.

Loss of such airports would affect not only the general aviation community based at those facilities, but also the cities and towns that currently rely on those airports for overnight package deliveries of urgent goods, medical supplies, and other shipments too critical to send by ground transportation.

5. The creation of such uncertainty and unpredictability in the capacity and development of our National Aviation System will have direct and indirect adverse consequences for commerce and the traveling public.

General economic growth of the nation and its local communities has increased the demand for air transport. Changed public expectations and new business models have accelerated that demand and served to establish safe, efficient air transportation as a lynchpin of the public welfare. The traveling public – families, individuals, and private and public organizations – have come to expect safe, reliable, and affordable commercial air transportation as an integral part of their daily lives.

At a minimum, national commerce and the traveling public will be saddled with increased costs that must be

passed on by airports subject to *per se* takings liability for safety based regulations, and the increased costs likely will be for less service.

Ii. The *Penn Central* Analysis Applies To Safety-Based Height Limitations Near Runways Because It Takes Into Account The Reasonable Investment-Backed Expectations Of The Landowner And The Character Of The Regulation Of Airspace

The three-factor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), is the appropriate analysis to determine whether a taking occurred in this case. Unlike the *per se* taking analysis adopted by the Nevada Supreme Court, the *Penn Central* analysis allows a court to determine whether petitioners struck an appropriate balance between the accommodation of nonaviation usage of navigable airspace and the prevention of such usage if it would decrease the safety and capacity of the airspace and airport system. Petitioners have discussed the specific facts relevant to the first *Penn Central* factor and demonstrated the absence of any significant economic impact on the particular land at issue here. Pet. 25-26. The second and third *Penn Central* factors address more general matters of public importance which are of greater interest to *amici*.

A. Respondent held no reasonable investment-backed expectation that he could construct a building above the 66-foot high, four-story structure previously approved by petitioners on the land respondent purchased near the McCarran International Airport runway in the 1980s.

McCarran International Airport is typical of many airports where local authorities built the airport far away from substantial development, but development grew around the airport. In such circumstances, the landowners have no reasonable expectation of developing their property without regard for the operations of the airport. This is especially so when landowners benefited from the airport's development in the first place. *See Suburban*

O'Hare Comm'n v. Dole, 787 F.2d 186, 200 (7th Cir.) ("Petitioners conceive of themselves as the innocent, passive victims of a relentlessly expansive O'Hare. * * * In all fairness, however, these same communities receive enormous economic benefits from their proximity to O'Hare."), *cert. denied*, 479 U.S. 847 (1986). Thus, for example, "[a]t airports like Westchester and those in Newark and Teterboro, N.J., 'it is almost impossible to expand * * * because many developers have built right up against airport fences.'" Elsa Brenner, *Many Private Planes To Store, But Not Enough Hangars*, The N.Y. Times, Dec. 27, 2006 (quoting James K. Coyne, president of the National Air Transport Association).

B. This Court recently reaffirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the significance of the character of the governmental action in the *Penn Central* analysis. The Court emphasized that it is important whether a challenged government regulation "amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* at 539 (quoting in part *Penn Central*, 438 U.S. at 124).

Certainly, regulations that restrict the height of future buildings on previously undeveloped land near pre-existing airport runways constitute a public program that benefits the common good. The regulations impose a limited economic burden that promotes the common good by safeguarding the life and property of both those who travel in aircraft and those who occupy the buildings below.

Height regulations near airports that reflect federal criteria also promote the common good because they support a national standard. They are based in part on FAA hazard determinations and are an integral part of the scheme of cooperative federalism that governs our National Aviation System. This Court has recognized the need for a comprehensive approach to airspace management, explaining that local constraints on aircraft operations can cause an increase in "congestion and the concomitant

decrease in safety." *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 639 (1973). Such a system cannot function if courts and juries are able to impose massive fiscal liability, as in the instant case, on state or local entities who seek to comply with the views of this expert federal agency. The risk of such liability would discourage thousands of state and local entities that have zoning authority near airports from adoption or enforcement of land use standards that protect the safe and efficient operation of the national air transportation system.

CONCLUSION

For the reasons set forth above and to ensure the safe, secure, and economical use of our National Aviation System, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

BETH S. BRINKMANN
Counsel of Record
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 887-1544

JOSEPH M. QUINN III
MARA E. ROSALES
MEYERS NAVE
555 12th St.
Suite 1500
Oakland, CA 94607

Counsel for amicus curiae
Airports Council
International-North America

JONATHAN A. COHEN
JAMES W. JOHNSON
AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL
535 Herndon Parkway
Herndon, VA 20170
(703) 689-4323

Counsel for amicus curiae
Air Line Pilots
Association, International

THOMAS RICHICHI
GUS B. BAUMAN
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6000

DAVID A. BERG
KATHERINE ANDRUS
AIR TRANSPORT ASSOCIATION
OF AMERICA, INC.
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, DC 20004

Counsel for amicus curiae
Air Transport Association of America, Inc.

JOHN S. YODICE
AIRCRAFT OWNERS AND PILOTS ASSOCIATION
601 Pennsylvania Ave., N.W.
Suite 875
Washington, DC 20004

Counsel for amicus curiae
Aircraft Owners and Pilots Association

PATRICIA A. HAHN
AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA
1775 K St., N.W.
Washington, DC 20006

Counsel for amicus curiae
Airports Council International-North America

J.E. MURDOCK III
NATIONAL BUSINESS AVIATION ASSOCIATION
1200 Eighteenth St., N.W.
Suite 400
Washington, DC 20036

Counsel for amicus curiae
National Business Aviation Association, Inc.

R. BRUCE KEINER, JR.
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004

Counsel for amicus curiae
Regional Airline Association

JANUARY 12, 2007